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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1939

No. 475

JOSEPH D. McGOLDRICK, COMPTROLLER OF THE CITY OF NEW YORK, PETITIONER,

vs.

BERWIND-WHITE COAL MINING COMPANY

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK

PETITION FOR CERTIORARI FILED OCTOBER 18, 1939.

CERTIORARI GRANTED DECEMBER 4, 1939.

SUPREME COURT OF THE UNITED STATES

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INDEX.

	Original	Print
Record on appeal to Court of Claims	1	1
Statement under Rule 234	1	1
Order requiring Comptroller to make return	3	2
Petition	6	3
Exhibit I—Letter from Deputy Comptroller to Berwind-White Coal Mining Co., dated April 25, 1936 and attached schedules	20	13
Exhibit II—Letter from Berwind-White Coal Mining Co. to Comptroller, May 13, 1936	28	19
Exhibit III—Letter from Deputy Comptroller to Davis, Polk, Wardwell, Gardiner & Reed, July 1, 1937 and attached schedule	29	19
Exhibit IV—Letter from Deputy Comptroller to Davis, Polk, Wardwell, Gardiner & Reed, July 1, 1937 and attached schedule	32	21
Exhibit V—Letter from Berwind-White Coal Mining Co. to Comptroller, July 19, 1937	34	22
Comptroller's return	35	23
Memo. re Documents 1 and 2	39	25
Document 3—Minutes of hearing, April 20, 1937	40	26
Colloquy of counsel	40	26

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 24, 1939.

—4160

	Original	Print
Record on appeal to Court of Appeals—Continued.		
Comptroller's return—Continued.		
Document 3—Minutes of hearing, April 20, 1937—Continued.		
Testimony of Charles E. Dunlap	41	27
Frederick D. Seymour	64	45
Frank E. Ward	75	54
George McCree	75	55
Leroy A. French	82	60
Porter C. Savage	88	65
George MacDougall	108	82
Leland B. Bonnett	112	86
Porter C. Savage (recalled)	117	90
George W. Jones	119	91
Frederick D. Seymour (recalled)	128	98
Memo. re Taxpayer's Exhibits 1, 2 and 3	141	108
Taxpayer's Exhibit 4—Summary of sales to customers in connection with whom sales tax has been assessed for the period, December 10, 1934 to December 31, 1935	142	109
Taxpayer's Exhibit 5—Invitation to bid	143	110
Taxpayer's Exhibit 6—Letter from Charles E. Dunlap to Receivers of the Interborough, February 28, 1934	145	111
Taxpayer's Exhibit 7—Letter from Thomas E. Murray to Berwind-White Coal Co., March 27, 1934	147	112
Taxpayer's Exhibit 8—Agreement between Berwind-White Coal Co. and Thomas E. Murray as receiver, April 1, 1934	148	113
Taxpayer's Exhibit 9—Letter from Charles E. Dunlap to Thomas E. Murray, January 3, 1935	157	120
Taxpayer's Exhibit 10—Letter from Geo. Keegan to Berwind-White Coal Co., January 4, 1935	159	121
Memo. re Taxpayer's Exhibit 11	160	121
Taxpayer's Exhibit 12—Agreement between Berwind-White Coal Co. and New York Edison Company, February 7, 1934	161	122
Memo. re Taxpayer's Exhibits 13-16	166	125
Taxpayer's Exhibit 17—Agreement between Berwind-White Coal Co. and Brooklyn-Edison Co., February 6, 1934	166	126
Memo. re Taxpayer's Exhibit 18	168	127
Taxpayer's Exhibit 19—Agreement between Berwind-White Coal Co. and Williamsburgh Power Plant Corporation, May 26, 1934	169	127
Memo. re Taxpayer's Exhibit 20	172	130
Taxpayer's Exhibit 21—Agreement between Berwind-White Coal Co. and New England S.S. Co., March 6, 1934	172	130

	Original	Print
Record on appeal to Court of Appeals—Continued.		
Comptroller's return—Continued.		
Document 3—Minutes of hearing, April 20, 1937—Continued.		
Taxpayer's Exhibit 22—Agreement between Berwind-White Coal Co. and Arbuckle Brothers, December 17, 1934	175	131
Taxpayer's Exhibit 23—Agreement between Berwind-White Coal Co. and L. A. Dreyfus Co., June 30, 1934	179	134
Taxpayer's Exhibit 24—Agreement between Berwind-White Coal Co. and L. A. Dreyfus Co., July 29, 1935	183	137
Taxpayer's Exhibit 25—Coal order, December 26, 1934	186	139
Taxpayer's Exhibit 26—Letter from Berwind-White Coal Co. to Austin, Nichols & Co., December 27, 1934	187	140
Taxpayer's Exhibit 27—Agreement between Berwind-White Coal Co. and All America Cables, Inc., November 25, 1933	188	140
Memo. re Taxpayer's Exhibits 28-38	191	142
Taxpayer's Exhibit 39—Letter from Ocean Dominion S.S. Corporation to Berwind-White Coal Co., March 5, 1934	191	143
Taxpayer's Exhibit 40—Delivery receipt	193	144
Taxpayer's Exhibit 41—Shipping document	194	145
Stipulation re exhibits omitted from record	195	146
Memo. re documents 4, 5 and 6	198	147
Waiver of certification	199	147
Notice of appeal to Court of Appeals	201	148
Order of Appellate Division	203	149
Opinion of Appellate Division	205	150
Waiver of certification	206	150
Order on remittitur	207	151
Judgment on remittitur	209	152
Affidavit of no opinion by Court of Appeals	211	153
Notice of motion to amend remittitur	212	154
Motion for reargument or for amendment to remittitur	215	155
Order denying reargument and amending remittitur	219	158
Remittitur, Court of Appeals	221	159
Order on amended remittitur	223	160
Clerk's certificate, Supreme Court	225	161
Order extending time within which to apply for writ of certiorari	226	162
Order allowing certiorari		163

[fol. 1]

IN SUPREME COURT OF NEW YORK
APPELLATE DIVISION—FIRST DEPARTMENT

In the Matter of the Application of

THE BERWIND-WHITE COAL MINING COMPANY, Petitioner,

for a certiorari order against

JOSEPH D. McGOLDRICK, as Comptroller of the City of New York, Respondent

STATEMENT UNDER RULE 234

This is a certiorari proceeding to review a final determination of the Comptroller of the City of New York, dated July 1, 1937, of an application made in accordance with Local Law No. 20 of 1934, as amended, by The Berwind-White Coal Mining Company for a review and reconsideration of the taxes assessed and determined against it under such law by the Comptroller of the City of New York for the period December 10, 1934 to December 31, 1935.

The order of certiorari was signed by Mr. Justice Edward [fol. 2] J. McGoldrick on July 22, 1937, entered on July 24, 1937, and served on July 27, 1937 on Frank J. Taylor, Comptroller of the City of New York, then the Respondent, together with a bond in the amount of $500 furnished by The Berwind-White Coal Mining Company and approved by Mr. Justice Edward J. McGoldrick on July 22, 1937.

The Comptroller made his return to the order of Certiorari on August 18, 1937.

Davis Polk Wardwell Gardiner & Reed, 15 Broad Street, New York City, appear as attorneys for The Berwind-White Coal Mining Company.

Paul Windels, Esq., Corporation Counsel, originally appeared for Respondent Frank J. Taylor, Comptroller of the City of New York, the Respondent at present is represented by William C. Chanler, Esq., Corporation Counsel of the City of New York. Frank J. Taylor, originally named Respondent as Comptroller of the City of New York, was succeeded as Comptroller of the City of New York on January 1, 1938, by Joseph D. McGoldrick, the Respondent. There have been no other changes in attorneys of parties herein.

[fol. 3] IN SUPREME COURT OF NEW YORK, COUNTY OF NEW YORK, SPECIAL TERM, PART II

[Title omitted]

ORDER REQUIRING COMPTROLLER TO MAKE RETURN—July 22, 1937

To Honorable Frank J. Taylor, Comptroller of the City of New York:

On reading and filing the annexed petition of The Berwind-White Coal Mining Company duly verified July 22nd, 1937, whereby it appears that Frank J. Taylor, as Comptroller of the City of New York, has made a final determination after a hearing, to the effect that petitioner, The Berwind-White Coal Mining Company, is liable to the City of New York for taxes in the amount of $140,517.97 and penal-
[fol. 4] ties in the amount of $36,185.92, a total of $176,703.89, assessed by the said Comptroller under Local Law No. 20 of the City of New York for the year 1934, as amended, upon the amount of receipts from sales of coal made by petitioner to purchasers in New York City during the period from December 19, 1934 to December 31, 1935, and that petitioner has deposited under protest with the said Comptroller the amounts assessed as aforesaid as taxes and penalties;

And the Court, in its discretion, having dispensed with notice of the application for this order,

Now, on motion of Davis Polk Wardwell Gardiner & Reed, attorneys for the petitioner, it is

Ordered that you, Frank J. Taylor, Comptroller of the City of New York, within twenty days after the service of this order upon you, do certify and return to this Court, in the office of the Clerk of the County of New York, at the County Court House, Centre and Pearl Streets, all and singular your proceedings, decisions, determinations and actions in the premises, with the dates thereof, respectively, and all and singular the evidence, documents and records and all other papers before you, or which were submitted to you concerning the taxation of petitioner, with your determination, particularly the evidence and your determination on the taxability, under Local Law No. 20 of 1934 of the City of New York, as amended, of the sales of coal made by petitioner, and the receipts therefrom, during the

period from December 10, 1934 to December 31, 1935, to the end that your decision and action may be reviewed and corrected on the merits by this Court and that any errors committed by you in determining and making the aforesaid assessment against the petitioner, under the said Local [fol. 5] Law No. 20 of 1934, as amended, and in your exacting payment thereof, may be reversed or corrected, according to law, and such other and further relief granted as this Court may deem just and proper; and it is

Further ordered that the petitioner file with the said Comptroller of the City of New York an undertaking of a surety company authorized to do business in the State of New York, as surety, in the sum of $500, to the effect that, if this order be dismissed or if the aforesaid tax sought to be reviewed hereby be confirmed, petitioner will pay all costs and charges which may accrue in the prosecution of this proceeding.

Enter,

E. J. McG., Justice of the Supreme Court.

[fol. 6] IN SUPREME COURT OF NEW YORK

New York County

[Title omitted]

PETITION

To the Supreme Court of the State of New York:

The petition of The Berwind-White Coal Mining Company respectfully shows to this Court:

First. Petitioner, The Berwind-White Coal Mining Company, was at all the times hereinafter mentioned and still is a corporation organized and existing under the laws of the State of Pennsylvania with its principal office and place of business at 1100 Commercial Trust Building, Philadelphia, Pennsylvania, and was and is duly qualified to transact business in the State of New York.

Second. Respondent, Frank J. Taylor, was at all the times hereinafter mentioned and still is Comptroller of the City of New York.

[fol. 7] Third. Petitioner is, and has been for approximately forty years past, engaged in the business of mining, producing and selling bituminous coal. It owns, and during the aforesaid period it has owned, coal mines in the Counties of Cambria and Somerset, in the State of Pennsylvania. The coal which it produces and has produced from such mines is of two kinds, bearing the trade names of (1) Berwind's Eureka and (2) Berwind's Standard C. Prime. Berwind's Eureka coal is produced from a vein known as the "B seam". Berwind's Standard C Prime coal is produced from a vein known as the "C Prime seam". The aforesaid mines owned by petitioner in Pennsylvania covering the B seam and the C Prime seam are and have been the only source of Berwind's Eureka and Berwind's Standard C Prime coal. It is, and has been during the aforesaid period, the practice of petitioner to sell Berwind's Eureka and Berwind's Standard C. Prime coal by such trade names to purchasers in New York City. The principal purchasers of Berwind's Eureka coal are and have been public utility companies and steamship companies. Berwind's Eureka and Berwind's C Prime coal are and have been sold to industrial companies and dealers. All coal sold to purchasers in New York City is, and has been during the aforesaid period, shipped from the aforesaid mines in Pennsylvania directly to the purchasers. Petitioner does not have and has never had any facilities for the storage of coal, and it has never been the practice of petitioner to maintain any coal in storage.

Fourth: The contracts made by petitioner for the sale of coal to purchasers located in New York City, fall into [fol. 8] two classes, namely (1) term contracts and (2) spot contracts. The term contracts require deliveries over a period of time, usually for one year. The spot contracts usually cover a single delivery to be made within a short time after the contract is made. All contracts for the sale of coal to purchasers located in New York City contemplate and require that delivery be made from petitioner's mines in Pennsylvania. In the cases of all the utility companies and most of the steamship companies and most of the other purchasers, the contracts require delivery of the coal to be made free alongside the plants or steamships of the purchaser. In some cases the contracts require delivery to be made to the purchaser free on board cars at the mines,

and in other cases the contracts require delivery to be made free on board cars at Harsimus Pier, Jersey City, New Jersey.

Fifth. Petitioner has consistently maintained for a period of approximately forty years past the following practice in making deliveries of coal to purchasers located in New York City whose contracts require delivery free alongside the purchaser's plants or steamships: Pursuant to orders received from the purchasers at petitioner's New York office, which orders are transmitted to the mines, the coal is mined and placed on board railroad cars at the mines. Such railroad cars are carried over the Pennsylvania Railroad to Harsimus Pier, Jersey City, New Jersey, located on the Hudson River. The coal is then dumped from the cars into barges, each barge being loaded for a particular purchaser to fulfill a particular order. The barges are then towed alongside the purchaser's plant or steamship and are unloaded by the purchaser.

[fol. 9] Sixth: During the period commencing December 10, 1934 and ending December 31, 1935, petitioner made sales of Berwind's Eureka coal in accordance with the practice described in Paragraphs "Third", "Fourth" and "Fifth" hereof, pursuant to term contracts requiring delivery of the coal from petitioner's mines in Pennsylvania, free alongside the plant or steamship of the purchaser, with the following purchasers located in the City of New York:

Brooklyn-Edison Company
The New York Edison Company
The United Electric Light and Power Company
Interborough Rapid Transit Company
Williamsburg Power Plant Corporation
All American Cables, Inc.
Clyde-Mallory Lines
Compagnie Generale Transatlantique
International Mercantile Marine Company
The New York & Porto Rico Steamship Co.
Ocean Dominion Steamship Corporation
Compania Transatlantica

During the same period petitioner made sales of Berwind's Standard C Prime coal in accordance with the practice described in Paragraphs "Third", "Fourth" and "Fifth" hereof pursuant to term contracts requiring delivery of the

coal from petitioner's mines in Pennsylvania, free alongside the purchaser's plant, with the following purchasers located in the City of New York:

L. A. Dreyfus Company
Arbuckle Brothers

During the same period petitioner made sales of Berwind's Eureka coal in accordance with the practice described in [fol. 10] Paragraphs "Third", "Fourth", and "Fifth" hereof pursuant to spot contracts, requiring delivery of the coal from petitioner's mines in Pennsylvania, free alongside the plants or steamships of the purchasers with the following purchasers located in New York City:

Caddell Dry Dock & Repair Company
North Atlantic & Gulf Steamship Company
Pioneer Terminal Corporation
United States Navigation Company

All deliveries of coal pursuant to all the aforesaid contracts were made by petitioner by shipment from petitioner's mines in Pennsylvania pursuant to the terms of said contracts and in accordance with the practice described in Paragraph "Fifth" hereof. All the purchasers named above had purchased from petitioner coal of the trade name specified in the above-mentioned contracts for many years prior to 1935 and such purchases had been made pursuant to the same practice described in Paragraphs "Third", "Fourth" and "Fifth" hereof.

Seventh: During the period commencing December 10, 1934 and ending March 31, 1935 petitioner made sales of Berwind's Eureka coal pursuant to a term contract with New England Steamship Company requiring delivery of the coal to be made from petitioner's mines in Pennsylvania to the purchaser free on board cars at Harsimus Pier, Jersey City, New Jersey. During the period commencing April 1, 1935 and ending December 31, 1935, petitioner made sales of Berwind's Eureka coal pursuant to spot contracts with New England Steamship Company requiring delivery to be made from petitioner's mines in Pennsylvania to the [fol. 11] purchaser free on board cars at Harsimus Pier, Jersey City, New Jersey. All deliveries of coal made by petitioner pursuant to these contracts were made in accordance with the terms of the contract and were completed

by delivery of the coal free on board cars at Harsimus Pier, Jersey City, New Jersey.

Eighth: During the period commencing December 10, 1934 and ending December 31, 1935, petitioner made sales of Berwind's Eureka coal pursuant to spot contracts with Austin Nichols & Company requiring delivery of the coal to be made to the purchaser free on board cars at the mines of the petitioner in Pennsylvania. The aforesaid sales to Austin Nichols & Company were completed by delivery of the coal free on board cars at petitioner's mines in Pennsylvania.

Ninth: On August 18, 1934, Chapter 873 of the Laws of New York of 1934, became effective, authorizing the City of New York, and certain other cities within the State, until December 31, 1935, to impose certain taxes. The said Chapter 873 contained the following provision:

"This act shall not authorize the imposition of a tax on any transaction originating and/or consummated outside of the territorial limits of any such City, notwithstanding that some act be necessarily performed with respect to such transaction within such limits."

Tenth: Pursuant to the provisions of said Chapter 873, the Municipal Assembly of the City of New York enacted Local Law No. 20 of 1934, which became effective on December 5, 1934. Said Local Law No. 20 was subsequently amended by Local Law No. 24 of 1934, and was again sub-[fol. 12] sequently amended by Local Law No. 23 of 1935. The said Local Law No. 20 as amended imposed a tax of 2% during the period commencing December 10, 1934, and ending December 31, 1935, on the amount of receipts from the sale in the City of New York of tangible personal property, such tax to be collected by the vendor from the purchaser and to be paid to the City of New York by the vendor. The following provision appears in Section 2 of the said Local Law as amended:

"* * * receipts upon which the State of New York and City of New York are by virtue of the provisions of the constitution of the United States or otherwise without power to impose a tax, shall not be subject to tax hereunder."

Eleventh: Local Law No. 25 of 1934 of the City of New York, which became effective December 28, 1934, imposed

a tax for the period commencing January 1, 1935 and ending December 31, 1935, of 2% upon the value of certain specified articles of personal property situated or owned within the City of New York, to be paid by the owner, such articles to be valued for the purposes of the tax at the actual purchase price. The said Local Law No. 25 exempts from the tax imposed thereby any article if it is one "upon the receipt from the sale of which a tax has been paid pursuant to the provisions of this law or Local Law No. 20 of 1934 as amended".

Twelfth: Prior to the making of the sales described in Paragraphs "Sixth", "Seventh" and "Eighth" hereof, petitioner was advised by its counsel and took the position that all its sales of coal to purchasers in the City of New [fol. 13] York, made pursuant to the practice described in Paragraphs "Third", "Fourth", and "Fifth" hereof were transactions in interstate commerce; that a tax on the amount of the receipts from such sales would constitute a burden on interstate commerce in violation of the Commerce Clause of the Federal Constitution; and that therefore such sales were not subject to the tax imposed by the aforesaid Local Law No. 20 of 1934, as amended. Consequently, petitioner did not currently report nor currently pay tax under the said Local Law upon the amounts of the receipts from such sales.

Thirteenth: On or about April 25, 1936, respondent sent to the petitioner a letter with certain exhibits attached, giving notice that he had determined that there was due and payable to the City of New York a deficiency of $167,518.10, consisting of $151,008.31 principal amount and $16,429.79 interest, for the period from December 10, 1934 to December 31, 1935, pursuant to Local Law No. 20 of 1934, as amended, and that such determination finally and irrevocably fixed the amount of the tax due, unless application in writing was made for a hearing within thirty days after the date of said letter. A copy of said letter and the exhibits attached thereto is annexed hereto marked Exhibit I and made a part hereof. Upon information and belief the receipts from all the sales described in Paragraphs "Sixth", "Seventh" and "Eighth" were included as taxable receipts by respondent in computing the deficiency asserted in the aforesaid letter of April 25, 1936.

Fourteenth: On May 13, 1936, application was made by the petitioner for a hearing with respect to the respondent's determination disclosed by his letter of April 25, 1936. A [fol. 14] copy of the said application for hearing is annexed hereto marked Exhibit II and made a part hereof. An informal hearing was granted by the respondent and was held in the office of the Emergency Revenue Division, 50 Lafayette Street, New York City, on or about October 5, 1936, at which petitioner contended that the sales described in Paragraphs "Sixth", "Seventh" and "Eighth" were transactions in interstate commerce and therefore, by virtue of the provisions of the Federal Constitution and Local Law No. 20 of 1934 as amended, the sales were not subject to the tax imposed by the said Local Law. The petitioner further contended at such hearing that the sales described in Paragraphs "Seventh" and "Eighth" were transactions consummated outside of the territorial limits of the City of New York and were not subject to the tax imposed by the said Local Law by reason of the provisions of Chapter 873 of the Laws of New York of 1934, quoted in Paragraph "Ninth" hereof. Following the aforesaid informal hearing the case was set down for formal hearing on April 20, 1937. On the said date and on the adjourned dates of May 6, 1937, and May 21, 1937, petitioner made the same contentions and introduced certain oral and written evidence in support of such contentions to the effect that it was not subject to the tax imposed by Local Law No. 20 of 1934 as amended, with respect to the sales of coal described in Paragraphs "Sixth", "Seventh" and "Eighth" hereof.

Fifteenth: By a letter dated July 1, 1937, addressed to the attorneys for the petitioner and received by said attorneys on July 7, 1937, in an envelope postmarked New York, New York, July 6, 1937, respondent gave notice that as a [fol. 15] result of the aforesaid hearings the assessment theretofore made was increased to $177,889.63, consisting of principal $141,497.92 and penalties $36,391.71, and that the determination of such assessment was final and irrevocable. A copy of the said letter and determination is annexed hereto marked Exhibit III and made a part hereof.

Sixteenth. On July 19, 1937, respondent delivered to the attorneys for petitioner another letter dated July 1, 1937,

in substitution for, and superseding the letter referred to in Paragraph "Fifteenth" hereof. Petitioner's attorneys received said letter on July 19, 1937 with the understanding that the time within which petitioner might apply for an order of certiorari was not to be deemed extended beyond the date fixed by their receipt of the original letter referred to in Paragraph "Fifteenth" hereof. The aforesaid letter, delivered on July 19, 1937, gave notice that as a result of the aforesaid hearings the assessment against petitioner, as finally determined by respondent was in the amount of $176,703.89, consisting of principal $140,517.97 and penalties $36,185.92. A copy of the said letter and determination is annexed hereto marked Exhibit IV and made a part hereof. Upon information and belief, the amount of the receipts upon which respondent based the aforesaid final determination consists entirely of receipts from the sales described in Paragraphs "Sixth", "Seventh" and "Eighth" hereof.

Seventeenth: On July 19, 1937, pursuant to Section 7 of Local Law No. 20 of 1934, as amended, petitioner deposited under protest with respondent the aforesaid sum of $176,703.89, the same being the amount of tax and penalties [fol. 16] determined by respondent and herein sought to be reviewed. A copy of petitioner's letter of protest to respondent dated July 19, 1937, which accompanied the aforesaid deposit, is annexed hereto marked Exhibit V and made a part hereof.

Eighteenth. Upon information and belief, respondent has assessed against and collected from several of the purchasers mentioned in Paragraph "Sixth" hereof, the tax imposed by Local Law No. 25 of 1934, with penalties thereon, upon coal purchased by such purchasers from petitioner between January 1, 1935 and December 31, 1935, although the receipts from the sale of the same coal have been determined by respondent to be taxable under Local Law No. 20 of 1934, as amended, and have been included by respondent as taxable receipts in his final determination of tax and penalties herein sought to be reviewed.

Nineteenth. Petitioner claims that the assessment and collection by respondent under Local Law No. 20 of 1934, as amended, of the aforesaid tax and penalties in the amount of $176,703.89 was erroneous and illegal for the following reasons:

1. All the sales and the receipts therefrom, upon which the said assessment was based, namely, the sales described in Paragraph "Sixth", "Seventh", and "Eighth" hereof, were made in and constituted transactions in interstate commerce, and therefore the tax imposed thereon is a burden on interstate commerce in violation of the provisions of the Commerce Clause of the Federal Constitution, and the said sales and the receipts therefrom are not subject to the tax imposed by Local Law No. 20 of 1934, as amended.

[fol. 17] 2. In so far as the said assessment was based upon the sales and the receipts therefrom, described in Paragraphs "Seventh" and "Eighth" hereof, it was erroneous and illegal for the further reason that such assessment violates the provisions of Chapter 873 of the Laws of New York of 1934, in that the said sales constituted transactions consummated outside of the territorial limits of the City of New York.

3. The exaction by respondent of tax, with penalties thereon, under Local Law No. 25 of 1934, from the purchasers, and the exaction of tax with penalties thereon, under Local Law No. 20 of 1934, as amended, from petitioner, with respect to the same items of coal purchased constituted an unlawful double exaction not contemplated by either of said local laws. The assessment and collection by respondent of the aforesaid tax and penalties under the said Local Law No. 25, is in effect an admission by him that the receipts from sales of the coal in respect of which such tax has been assessed and collected are not subject to the tax imposed by the said Local Law No. 20, as amended, and the respondent's exaction of tax and penalties from petitioner with respect to such sales is inconsistent with his exaction of the aforesaid tax and penalties from the purchasers.

4. The exaction from petitioner by respondent of penalties in the amount of $36,185.92, representing between 21% and 31% of the amount of tax assessed, constituted an abuse of the discretion granted to respondent with respect to penalties under Section 15 of Local Law No. 20 of 1934, as amended.

[fol. 18] Twentieth. By reason of the foregoing your petitioner is and will be greatly injured by the aforesaid illegal assessment and collection of taxes and penalties. Your petitioner is advised that the aforesaid action and determi-

nation of respondent may be reviewed by an order of certiorari. No previous application for such order in this matter has been made to any court or judge.

Twenty-First. Submitted herewith for the approval of a Justice of this Court is an undertaking of the National Surety Corporation, a corporation duly authorized to transact business in the State of New York, as surety, in the sum of $500, to the effect that if the order of certiorari hereby prayed for be dismissed, or if the tax sought to be reviewed thereby be confirmed, the petitioner will pay all costs and charges which may accrue in the prosecution of this proceeding. The said undertaking, if approved by a Justice of this Court, will be filed with respondent.

Wherefore, your petitioner prays that a certiorari order be granted hereunder, directed to Frank J. Taylor, as Comptroller of the City of New York, commanding him to certify and to return to this Court, in the office of the Clerk of the County of New York, at the County Court House, Centre and Pearl Streets, all and singular his proceedings, decisions, determinations and actions in the premises with the dates thereof, respectively and all and singular the evidence, documents and records and all other papers before him or which were submitted to him concerning the taxation of petitioner, with his determination, particularly the evidence and his determination on the taxability under Local Law No. 20 of 1934 of the City of New York, as [fol. 19] amended, of the sales of coal made by petitioner, and the receipts therefrom, during the period from December 10, 1934 to December 31, 1935, to the end that his decision and action may be reviewed and corrected on the merits by this Court and any errors committed by him in determining and making the aforesaid assessment against petitioner under the said Local Law No. 20 of 1934, as amended, and in exacting payment thereof, may be reversed or corrected according to law and that petitioner may have such other and further relief as to the Court may seem just and proper.

The Berwind-White Coal Mining Company, Petitioner, By O. M. Hinton, Vice-President. Davis Polk Wardwell Gardiner & Reed, Attorneys for Petitioner, Office & P. O. Address, 15 Broad Street, Borough of Manhattan, New York City.

(Verified by O. M. Hinton the 22nd day of July, 1937.)

[fol. 20]

EXHIBITS, ANNEXED TO FOREGOING PETITION

EXHIBIT I

Frank J. Taylor
Comptroller
Milton Solomon
Deputy Comptroller

The City of New York
Department of Finance

April 25, 1936.

Emergency Revenue Division
50 Lafayette Street, New York City

Name Berwind-White Coal Mining [redacted]
Address 1 Broadway, New York
Registration Number Misc.—5

	Tax Deficiency Period Ended	Principal	Interest	Total
Berwind-White Coal Mining Co.	2/28/35	35,547.20	5,687.55	41,234.75
	5/31/35	35,311.28	4,590.47	39,901.75
1 Broadway	8/31/35	33,449.45	3,344.95	36,794.40
New York, New York	12/31/35	46,780.38	2,806.82	49,587.20
	Total	151,088.31	16,429.79	167,518.10

Gentlemen:

The Comptroller hereby gives notice that based upon the exhibits and schedules hereto attached he has determined that there is due and payable to the City of New York a deficiency of $167,518.10 in the amount of the tax (including interest and/or penalties) for the period from December 10, 1934 to December 31, 1935, pursuant to Local Law No. 20 of 1934, as amended.

Notice is hereby given that this determination shall finally and irrevocably fix the amount of tax due unless application in writing is made by you for a hearing thereon within thirty days after date hereof.

[fol. 21] Section 15 of Local Law No. 20 1934, as amended, provides in part as follows:

"Any person failing to file a return or to pay over any tax to the Comptroller within the time required by this Local Law shall be subject to a penalty of five per centum of the amount of tax due, plus one per centum of such tax for each month of delay or fraction thereof excepting the

first month after such return was required to be filed or such tax became due * * *."

In the event of your failure to make application for a hearing within the time specified or to remit the tax assessed, the penalties as provided for in Section 15 hereinabove will become operative.

If you agree with the determination of your tax liability as stated above please remit the amount due together with this notice or a copy thereof, within thirty days after the date hereof.

Yours very truly, Milton Solomon, Deputy Comptroller.

[fol. 22]

Schedule 1
Misc.
J. G. Train & R. Kritzik, Accts.

Berwind-White Coal Mining Co.
1 Broadway
New York, N. Y.

Item 1 of Return

	12/10/34 2/28/35	3/ 1/35 5/31/35	6/ 1/35 8/31/35	9/ 1/35 12/31/35
Receipts from Sales				
Amount as Reported	None	None	None	None
Add: Receipts from Sales Not Reported (Note)	$2077257.92	$2066195.16	$1913077.82	$2829797.39
Amount as Adjusted	$2077257.92	$2066195.16	$1913077.82	$2829797.39

Note: These amounts represent receipts from sales of tangible personal property in the City of New York, as determined from an audit of the taxpayer's records.

Schedule 2

Item 4 of Return

	12/10/34 2/28/35	3/ 1/35 5/31/35	6/ 1/35 8/31/35	9/ 1/35 12/31/35
Value of Property Purchased Without Tax Used by you or in your business				
Amount as Reported	None	None	None	None
Amount as determined by Audit (Note)	$126.91	$226.04	$142.16	———
Amount as adjusted	$126.91	$226.04	$142.16	———

Note: These amounts represent purchases of tangible personal property used for consumption, and upon which no tax had heretofore been charged.

[fol. 23]

Schedule 3
Misc.
J. G. Train & R. Kritzik, Accts.

Berwind-White Coal Mining Co.
1 Broadway
New York, N. Y.

Item 11 of Return	12/10/34 2/28/35	3/ 1/35 5/31/35	6/ 1/35 8/31/35	9/ 1/35 12/31/35
Sales for Purpose of Resale				
Amount as Reported	None	None	None	None
Amount Allowed (Note)	$143205.71	$103443.94	$85677.54	$255289.87
Amount as adjusted	$143205.71	$103443.94	$85677.54	$255289.87

Note: These amounts represent receipts from sales of tangible personal property in the City of New York, which were sold for the purpose of resale, and for which the taxpayer presented proper resale certificate.

Schedule 4

Item 15	12/10/34 2/28/35	3/ 1/35 5/31/35	6/ 1/35 8/31/35	9/ 1/35 12/31/35
Receipts from sales delivered outside the City of New York				
Amount as reported	0	0	0	0
Add: (Note)	$151638.98	$192048.22	$133862.04	$232669.94
Amount as adjusted	$151638.98	$192048.22	$133862.04	$232669.94

Note: These items represent sales made to customers where delivery was made to points without the City of New York, and was determined by an audit of records of taxpayer.

[fol. 24]

Schedule 5

Item 20	12/10/34 2/28/35	3/ 1/35 5/31/35	6/ 1/35 8/31/35	9/ 1/35 12/31/35
Other deductions permitted by the law or regulations				
Amount as reported	0	0	0	0
Add: (Note)	$5,180.26	$5,365.25	$21,207.91	$2,818.46
Amount as adjusted	$5,180.26	$5,365.25	$21,207.91	$2,818.46

Note: These amounts represent charges made to customers for non-taxable items, as determined by an audit of the records of taxpayer, and consist of the following:

Period	12/10/34 2/28/35	3/ 1/35 5/31/35	6/ 1/35 8/31/35	9/ 1/35 12/31/35
Lighterage	$1,496.67	$536.13	$17.06	$.....
Interest Charges	511.89	761.60	693.47	821.84
Demurrage	.....	3,928.06	20,458.23	1,920.12
Telephone and Rent	3,171.70	139.46	39.15	76.50
	$5,180.26	$5,365.25	$21,207.91	$2,818.46

[fol. 25]

EXHIBIT "A"

The City of New York—Department of Finance—Emergency Revenue Division
50 Lafayette Street, New York, N. Y.

Name of Taxpayer Berwind-White Coal Mining Co.
Address: 1 Broadway, New York, N. Y.

Registration No. Misc.
Local Law No. 20 of 1934, as amended
Period Audited 12/10/34—12/31/35
Accountant J. G. Train & R. Kritzik

*Indicates Deduction

Item No.		Total	Period Audited 12/10/34 to 2/28/35	3/1/35 to 5/31/35	6/1/35 to 8/31/35	9/1/35 to 12/31/35	Sch. No.
A	Tax Due the City of New York as reported (Item 10 of return)		None	None	None	None	
B	Add—Tax—Two per centum of additional taxable receipts (Exhibit "C")		$35,547.20	$35,311.28	$33,449.45	$46,780.38	
C							
D	Total tax (Items A to C inclusive)		$35,547.20	$35,311.28	$33,449.45	$46,780.38	
E	Amount of tax—Two per centum of total receipts as adjusted (Exhibit B)	$ xxx	$35,547.20	$35,311.28	$33,449.45	$46,780.38	
F	Tax due the City of New York (Item D or E, whichever is greater)		—0—	—0—	—0—	—0—	
G	Amount of Tax Paid						
H	Balance of Tax unpaid (Item F minus Item G)	$151,088.31	$35,547.20 (16%)	$35,311.28 (13%)	$33,449.45 (10%)	$46,780.38 (6%)	
I	Add: Penalties to March 15, 1936	16,429.79	5,687.55	4,590.47	3,344.95	2,806.82	
J	Total Tax due the City of New York (Item H plus Item I)	$167,518.10	$41,234.75	$39,901.75	$36,794.40	$49,587.20	

City of New York—Department of Finance—Emergency
50 Lafayette Street, New York, N. Y.

Name of Taxpayer Berwind-White Coal Mining Co.
Address: 1 Broadway, N. Y. C.

Registration No. Misc.
Local Law No. 20 of 1934, as amended
Period Audited 12/10/34—12/31/35
Accountant J. G. Train & R. Kritzik

•Indicates Deduction

Item No.	Receipts from Sales and Services as Adjusted	Period 12/10/34 to 2/28/35	3/1/35 to 5/31/35	6/1/35 to 8/31/35	9/1/35 to 12/31/35	Sch. No.
1	Receipts from Sales (Not included in Items 2 or 3)	$2,077,257.92	$2,066,195.16	$1,913,077.82	$2,829,797.39	1
2	Receipts from installment sales					
3	Receipts from sales and Services of gas, electricity, refrigeration, etc.					
4	Value of property purchased without tax used by you or in your business	126.91	226.04	142.16	—0—	2
5	Total receipts (Items 1 to 4 inclusive)	$2,077,384.83	$2,066,421.20	$1,913,219.98	$2,829,797.39	
	Less: Allowable Deductions (Items 11 to 20 incl.)					
11	Receipts from sales for purpose of resale	$ 143,205.71	$ 103,443.94	$ 85,677.54	$ 255,289.87	3
12	Receipts from sales of food products					
13	Receipts from sales of food in restaurants where the charge per patron is less than $1.00					
14	Receipts from sales to Federal, State and Municipal agencies	151,638.98	192,048.22	133,862.04	232,669.94	4
15	Receipts from sales delivered outside the City					
16	Receipts from sales to Semi-public institutions					
17	Cash Discounts taken at time of sale and Trade Discounts					
18	Credits allowed on property accepted in part payment and intended for resale					
19	Credits allowed on property returned, cancelled sales and defective merchandise					
20	Other allowable deductions permitted by the law or regulations	5,180.26	5,365.25	21,207.91	2,818.46	5
21	Total Allowable Deductions (Items 11 to 20 incl.)	$ 300,024.95	$ 300,857.41	$ 240,747.49	$ 490,778.27	
	Total Taxable Receipts as Adjusted (Item 5 minus 21)	$1,777,359.88	$1,765,563.79	$1,672,472.49	$2,339,019.12	

See Exhibit A for Computation of Tax. Item Numbers correspond with item numbers on return.

2—475

17

EXHIBIT "C"

City of New York—Department of Finance—Emergency
50 Lafayette Street, New York, N. Y.

Name of Taxpayer Berwind-White Coal Mining Co.
Address: 1 Broadway, N. Y. C.

Registration No. Misc.
Local Law No. 20 of 1934, as amended
Period Audited 12/10/34—12/31/35
Accountant J. G. Train & R. Kritzik

*Indicates Deduction

Item No.	Summary of Additional Taxable Receipts	Period 12/10/34 to 2/28/35	3/1/35 to 5/31/35	6/1/35 to 8/31/35	9/1/35 to 12/31/35	Sch. No
	Add—Taxable Receipts not Reported:					
1	Receipts from sales	$2,077,257.92	$2,066,195.16	$1,913,077.82	$2,829,797.39	
2	Receipts from installment sales					
3	Receipts from sales and services of gas, electricity, refrigeration, etc.					
4	Value of property purchased without tax used by you or in your business	126.91	226.04	142.16	—0—	
5	Total taxable receipts not reported (Items 1 to 4 inclusive)	$2,077,384.83	$2,066,421.20	$1,913,219.98	$2,829,797.39	
	Add—Deductions Disallowed:					
11	Receipts from sales for purpose of resale	*143,205.71	*103,443.94	*85,677.54	*255,289.87	
12	Receipts from sales of food products					
13	Receipts from sales of food in restaurants where the charge per patron is less than $1.00					
14	Receipts from sales to Federal, State and Municipal agencies	*151,638.98	*192,048.22	*133,862.04	*232,669.94	
15	Receipts from sales delivered outside the City					
16	Receipts from sales to Semi-public institutions					
17	Cash Discounts taken at time of sale and Trade Discounts					
18	Credits allowed on property accepted in part payment and intended for resale					
19	Credits allowed on property returned, cancelled sales and defective merchandise					
20	Other deductions permitted by the law or regulations	*5,180.26	*5,365.25	*21,207.91	*2,818.46	
21	Total Deductions Disallowed (Items 11 to 20 incl.)	*$ 300,024.95	*$ 300,857.41	*$ 240,747.49	*$ 490,778.27	
	Total Additional Taxable Receipts (Item 5 plus 21)	$1,777,359.88	$1,765,562.79	$1,672,472.49	$2,339,019.12	

See Exhibit A for Computation of Tax. Item numbers correspond with item numbers on return

[fol. 28] EXHIBIT II

May 13, 1936.

Hon. Frank J. Taylor, Comptroller of the City of New York, Department of Finance, Emergency Revenue Division, 50 Lafayette Street, New York, N. Y.

Dear Mr. Comptroller:

We acknowledge receipt of your letter dated April 25, 1936, notifying us that you have determined that there is due and payable by us to the City of New York a deficiency in tax (including interest and penalties) of $167,518.10 for the period from December 10, 1934 to December 31, 1935, pursuant to Local Law No. 20 of 1934, as amended.

We have had no opportunity for a hearing before you with respect to the above mentioned determination. We maintain that there are no taxes, interest or penalties due and payable to New York City by us for any period under Local Law No. 20 of 1934, as amended.

Pursuant to Section 7 of Local Law No. 20 of 1934, as amended, we hereby make application for a hearing before you with respect to the determination disclosed by your letter of April 25th, in order that we may present at such hearing the facts and the grounds upon which we maintain that there are no taxes, interest or penalties due and payable by us to the City of New York under the said law.

Yours very truly, The Berwind-White Coal Mining Co., O. M. Hinton, Vice President and Comptroller.

[fol. 29] EXHIBIT III

Frank J. Taylor
Comptroller
Milton Solomon
Deputy Comptroller
Local Law # 20 of 1934,
as amended.
Misc.

WOrth 2-4780

(Seal)

The City of New York—Department of Finance

Emergency Revenue Division—50 Lafayette Street, New York City

July 1, 1937

Name: Berwind-White Coal Mining Co.
Address: 1 Broadway, New York City
Registration No. Misc.

	Tax Deficiency Period Ended	Principal	Penalties	Total
Davis, Polk, Wardwell, Gardiner & Reed, Esqs. 15 Broad Street New York City	2/28/35	$ 32332 84	10023 18	42356 02
	5/31/35	31941 74	8943 69	40885 43
	8/31/35	30198 22	7549 56	37747 78
	12/31/35	47025 12	9875 28	56900 40
	Total:—	$141497 92	36391 71	177889 63

GENTLEMEN:

Hearings having been held in this office on April 20th, May 6th and May 21st, 1937 in connection with your tax liability to the City of New York for the period from December 10, 1934 to December 31, 1935 pursuant to Section 7 of Local Law No. 20 of 1934, as amended, the Comptroller hereby gives notice that as a result of said hearings the assessment heretofore made is increased to $177,889.63, as shown in detail on the schedule hereto attached. This determination is final and irrevocable.

[fol. 30] In the event of your failure to pay the amount of the tax due, the Comptroller will issue a warrant in accordance with Section 8 of Local Law No. 20 of 1934 as, amended.

Payment of the amount due must be made within thirty days from the date hereof and this letter, or a copy thereof, should accompany your remittance.

Very truly yours, (Sgd.) Milton Solomon, Deputy Comptroller. SH:AS Enc.

[fol. 31] EXHIBIT III, ATTACHED SCHEDULE

Berwind-White Coal Mining Co.
1 Broadway
New York City
Final Determination

	12/10/34-2/28/35	3/1/35-5/31/35	6/1/35-8/31/35	9/1/35-12/31/35
Additional taxable receipts per assessment	$1777359 88	1705563 79	1672472 49	2339019 12
Less:				
Sales credits due to changes in freight rates:				
Interborough Rapid Transit Co.	$ 4137 15	233 50	12537 88	12237 30
New England S. S. Co	4046 30	63 50		
United Electric Light & Power		4545 66		
Allowance for taxes paid by taxpayer's customer:				
Williamsburg Power Plant Corp	152534 59	163634 26	150023 82	
Total Allowances	$ 160718 04	168476 92	162561 70	*12237 30
Adjusted taxable receipts	$1616641 84	1597086 87	1509910 79	2351256 42
2% of taxable sales	32332 84	31941 74	30198 22	47025 12
Penalties to June 15, 1937 (31%)	10023 18	(28) 8943 69	(25) 7549 56	(21) 9875 28
Total Tax & Penalties Due	$ 42356 02	40885 43	37747 78	56900 40

*Italics denote red.

[fol. 32]

EXHIBIT IV

WOrth 2-4780

Frank J. Taylor
Comptroller
Milton Solomon
Deputy Comptroller
Local Law #20 of 1934,
as amended.
Misc.

The City of New York

Department of Finance

Emergency Revenue Division
50 Lafayette Street, New York City

July 1, 1937

Name: Berwind-White Coal Mining Co.
Address: 1 Broadway, New York City
Registration No. Misc.

	Tax Deficiency Period Ended	Principal	Penalties	Total
Davis, Polk, Wardwell, Gardiner & Reed, Esqs. 15 Broad Street New York City	2/28/35	$ 32332.84	10023.18	42356.02
	5/31/35	31941.74	8943.69	40885.43
	8/31/35	30198.22	7549.56	37747.78
	12/31/35	46045.17	9669.49	55714.66
	Total:—	$140517.97	36185.92	176703.89

GENTLEMEN:

Hearings having been held in this office on April 20th, May 6th and May 21, 1937 in connection with your tax liability to the City of New York for the period from December 10, 1934 to December 31, 1935 pursuant to Section 7 of Local Law No. 20 of 1934, as amended, the Comptroller hereby gives notice that as a result of said hearings the assessment heretofore made is increased to $176,703.89, as shown in detail on the schedule hereto attached. This determination is final and irrevocable.

In the event of your failure to pay the amount of the tax due, the Comptroller will issue a warrant in accordance with Section 8 of Local Law No. 20 of 1934, as amended.

Payment of the amount due must be made within thirty days from the date hereof and this letter, or a copy thereof, should accompany your remittance.

Very truly yours, (Sgd.) Milton Solomon, Deputy Comptroller. SH:ts Enc.

[fol 33] EXHIBIT IV, ATTACHED SCHEDULE

Berwind-White Coal Mining Co.
1 Broadway
New York City

Final Determination

	12/10/34–2/28/35	3/1/35–5/31/35	6/1/35–8/31/35	9/1/35–12/31/35
Additional taxable receipts per assessment	$1777359.88	1765563.79	1672472.49	2339019.12
Less:				
Sales credits due to changes in freight rates:				
Interborough Rapid Transit Co	4137.15	233.50	12537.88	12237.30
New England S. S. Co	4046.30	63.50		
United Electric Light & Power		4545.66		
Allowance for taxes paid by taxpayer's customer:				
Williamsburg Power Plant Corp	152534.59	163634.26	150023.82	48997.97
Total Allowances	$ 160718.04	168476.92	162561.70	36760.67
Adjusted taxable receipts	$1616641.84	1597086.87	1509910.79	2302258.45
2% of taxable sales	32332.84	31941.74	30198.22	46045.17
Penalties to June 15, 1937 (51%)	10023.18	(28) 8943.69	(25) 7549.56	(21) 9669.49
	$ 42356.02	40885.43	37747.78	55714.66

* Italics denote red.

[fol 34] EXHIBIT V.

July 19, 1937.

Hon. Frank J. Taylor, Comptroller of the City of New York, Department of Finance, Emergency Revenue Division, 50 Lafayette Street, New York, N. Y.

Attention of Mr. Sol Herman

DEAR SIR:

Pursuant to the demand made in your letter dated July 1, 1937 for payment of the sum of $176,703.89 representing tax and penalties determined by you to be due under Local Law No. 20 of 1934, as amended, for the period from December 10, 1934 to December 31, 1935, from the undersigned, we hand you herewith our check in the amount of $176,703.89 as a deposit pursuant to Section 7 of Local Law

No. 20 of 1934, as amended, of the tax and penalties determined by you to be due.

You are advised that this deposit is not made voluntarily, but is made under protest and duress in order to avoid the assessment of further penalties, the issuance of a warrant as threatened in your letter of July 1, 1937, and in order to perfect our right to have your determination reviewed by an order of certiorari, pursuant to the above mentioned local law.

We enclose a copy of your letter of July 1, 1937 giving notice of your determination of the above mentioned tax.

Very truly yours, the Berwind-White Coal Mining Co. (signed) O. M. Hinton, Vice President and Comptroller.

[fol. 35] IN SUPREME COURT OF NEW YORK, NEW YORK COUNTY

[Title omitted]

RETURN TO ORDER OF CERTIORARI

To the Supreme Court of the State of New York:

Frank J. Taylor, Comptroller of the City of New York, does hereby certify and make this return to an order of certiorari granted herein by Hon. Edward J. McGoldrick, a Justice of this Court, on the 22nd day of July, 1937, consisting of all and singular his ruling and assessment in the premises, with his proceedings, decisions, determinations and actions in the premises, and all and singular the evidence, documents, records and other papers before him or which were submitted to him relative to his determination of tax, pursuant to New York City Local Law No. 20 [fol. 36] of 1934, as amended, against The Berwind-White Coal Mining Company:

1. Determination of the Comptroller of April 25, 1936, together with annexed exhibits, determinating tax deficiency due from petitioner under Local Law No. 20 of 1934, as amended, for the period from December 10, 1934 to December 31, 1935.

2. Letter dated May 13, 1936 from petitioner to Hon. Frank J. Taylor, Comptroller, requesting a hearing on said tax assessment.

3. Minutes of testimony of hearing held April 20, 1937, May 6, 1937 and May 21, 1937 at 50 Lafayette Street, Borough of Manhattan, City of New York, including the exhibits therein referred to.

4. Determination of the Comptroller of the City of New York, dated July 1, 1937, determining tax deficiency due from petitioner under Local Law No. 20 of 1934, as amended, for the period from December 10, 1934 to December 31, 1935 in the sum of $177,889.63.

5. Subsequent determination of the Comptroller of the City of New York, dated July 1, 1937, reducing determination of deficiency tax due from petitioner under Local Law No. 20 of 1934, as amended, for the period December 10, 1934 to December 31, 1935, to the sum of $176,703.89.

6. Letter from petitioner to the Comptroller of the City of New York, dated July 19, 1937, transmitting check in the sum of $176,703.89.

This return is based upon the records, proceedings and papers on file in the office of the Comptroller of the City of New York.

[fol. 37] On information and belief respondent denies so much of the allegations set forth in paragraphs "Fourth" and "Sixth" of the petition as allege that the contracts referred to contemplate or require that delivery be made from petitioner's mines in Pennsylvania, and denies each and every other allegation set forth in said paragraphs of the petition except as and to the extent that the same may be admitted by this return.

On information and belief, respondent denies so much of paragraph "Seventh" of the petition as alleges that said contracts required delivery of the coal from mines in Pennsylvania; denies so much thereof as alleges that deliveries were completed at Harsimus Pier Jersey City, New Jersey; and respondent denies each and every other allegation contained in said paragraph except to the extent that the same may be admitted by this return.

On information and belief, respondent denies so much of paragraph "Eighth" of the petition as alleges that the contracts required delivery at the mines and so much thereof as alleges that said contracts were completed by delivery at petitioner's mines; and respondent denies each and

every other allegation contained in said paragraph except to the extent that the same may be admitted by this return.

On information and belief, respondent denies the allegations set forth in paragraph "Nineteenth" of the petition.

Respondent denies any knowledge or information sufficient to form a belief as to any of the allegations set forth in paragraph "Twelfth" of the petition, except that the respondent admits that petitioner did not currently report [fol. 38] or pay the tax upon the receipts mentioned.

On information and belief, respondent denies the allegations set forth in paragraph "Eighteenth" of the petition, except to the extent that they may be admitted by this return.

Respondent denies each and every allegation set forth in paragraph "Twentieth" of the petition, except so much thereof as alleges that the Comptroller's determination may be reviewed by certiorari and that no previous application for such an order was made.

Respondent admits the allegations set forth in paragraph "Twenty-first" of the petition.

On information and belief, respondent denies all other allegations contained in the petition herein, except as the same and to the extent that they may have been admitted by this return.

In witness whereof, the Comptroller of the City of New York has hereunto set his hand this 18th day of August, 1937.

Frank J. Taylor, Comptroller of the City of New York.

DOCUMENTS ANNEXED TO RESPONDENT'S RETURN TO ORDER OF CERTIORARI

[fol. 39]

Document 1, Annexed to Return

This document is printed as Exhibit I annexed to Petition at page 20 hereof.

Document 2, Annexed to Return

This document is printed as Exhibit II annexed to Petition at page 28 hereof.

[fol. 40] DOCUMENT 3, ANNEXD TO RETURN

In the Matter of BERWIND-WHITE COAL MINING Co.

Review of Deficiency Assessment made pursuant to Local Law No. 20 of 1934, as amended for the period from December 10, 1934, to December 31, 1935, for the principal sum of $151,088.31, plus penalties and/or interest of $16,429.79, total $167,518.10.

No. 50 Lafayette Street, New York, N. Y.

April 20, 1937—10:30 A. M.

Before: Sol Herman, Esq., Presiding for the Comptroller

Appearances:

Morton Baum, Esq., Assistant Corporation Counsel, In behalf of the Comptroller.

Davis, Polk, Wardwell, Gardiner & Reed, Esqs., Attorneys for Petitioner. Marvin Lyons, Esq., of Counsel.

COLLOQUY

Mr. Herman: This is a hearing to review a deficiency assessment made against the Berwind-White Coal Mining Co. pursuant to Local Law No. 20 of 1934, as amended, for the period from December 10, 1934, to December 31, 1935, for the principal sum of $151,088.31 plus penalties and/or interest of $16,429.79, total of $167,518.10.

[fol. 41] Mr. Lyons: I offer in evidence power of attorney authorizing me to represent Berwind-White Coal Mining Company.

(Received and marked Taxpayer's Exhibit 1.)

I offer in evidence the deficiency notice dated April 25, 1936, to the Berwind-White Coal Mining Company. Will you accept a copy of that?

Mr. Herman: Yes.

(Received and marked Taxpayer's Exhibit 2.)

the period from December 31, 1934, to December 31, 1935, Berwind-White Coal Mining Company dated May 13, 1936, requesting a formal hearing.

(Received and marked Taxpayer's Exhibit 3.)

I offer in evidence a statement showing a summary of sales to customers by Berwind-White Coal Mining Company

in connection with whom taxpayer has been assessed for the period from December 10, 1934, to December 31, 1935.

Mr. Herman: I suggest you offer that for identification and then have the person who prepared it identify it.

Mr. Lyons: I thought you agreed these figures were correct and we would not have any question about that.

Mr. Herman: For the purpose of the record I would like you to have someone who prepared it identify it.

(Marked Taxpayer's Exhibit 4 for Identification.)

CHARLES E. DUNLAP, 102 East 73rd Street, New York City, having first been duly sworn, testified as follows:

Direct examination.

By Mr. Lyons:

Q. Mr. Dunlap, are you the president of The Berwind-White Coal Mining Company?

A. I am.

[fol. 42] Q. Where was that company organized?

A. In Pennsylvania.

Q. In what year, about, was it organized?

A. Incorporated in 1888.

Q. Where is the main office of the company?

A. Philadelphia, Pennsylvania.

Q. What office does that company have in New York?

A. Sales office in New York, at 1 Broadway.

Q. How long have you been associated with the company?

A. Since 1914.

Q. Were you the president of the company in 1934-1935?

A. I was.

Q. What is the business of the company?

A. The mining, producing and marketing of coal.

Q. How does the business differ from the business of a dealer in coal?

A. We sell our coal directly to the consumer or the buyer, and we mine and sell the coal that we produce.

Q. You don't buy coal for re-sale?

A. We do not.

Q. That isn't your business?

A. No.

Q. Does the company own coal mines?

A. Yes.

Q. Where are those mines located?

A. Somerset County, Pennsylvania.

Q. Has your company ever owned coal mines in the State of New York?

A. No.

Q. Are there any coal mines in the state of New York?

A. To my knowledge, no.

Q. Are those mines owned by the company located in Pennsylvania?

A. Yes.

Q. Do those mines owned by the company cover any particular seams or veins of coal?

A. They do; Miller B seam and C-prime.

Q. Is the coal extracted from the B seam a different quality from the coal extracted from the C prime seam?

A. It is.

Q. Will you compare the physical, chemical and burning qualities of the two classes of coal?

[fol. 43] A. B coal is a superior coal as to burning quality. It is higher in fixed carbon and lower in volatile matter. Lower in ash, than the C-prime coal.

Q. How long has your company owned mines covering the B and C prime seams?

A. Approximately forty years.

Q. Does the coal produced from the B seam have a trade name?

A. Berwind's Eureka.

Q. Sometimes referred to as Berwind's Standard Eureka?

A. Sometimes.

Q. And Berwind's Standard Eureka B seam coal?

A. B seam coal for the trade.

Q. The correct name is Berwind's Eureka?

A. Berwind's Eureka.

Q. How long has the B seam coal borne that trade name?

A. Approximately as long as we have been operating the mines, about 40 years.

Q. How is the coal produced in the C-prime seam different from Berwind's Eureka as to designation?

A. It is known as Berwind's Standard C-prime coal.

Q. Are the mines in Pennsylvania which you have referred to covering the B seam, the only source of Berwind's Eureka coal?

A. They are.

Q. Are the mines in Pennsylvania covering the C-prime seam the only source of Berwind's Standard C-prime coal?

A. They are.

Q. What classes of customers in New York City has it been the practice of your company to sell coal to?

A. Public utilities, steamship companies, industrial plants and wholesalers.

Q. That is, dealers who buy for re-sale?

A. Yes.

Q. What type of coal has it been the practice of your company to sell to the utility companies?

A. Berwind's Eureka.

[fol. 44] Q. What type of coal has it been the practice of your company to sell to steamship companies?

A. Berwind's Eureka.

Q. To whom, to what class of customers has it been your practice to sell Berwind's Standard C-prime coal?

A. To small industrial plants and to dealers.

Q. Approximately what is the annual tonnage of coal sold to customers in New York City?

A. About 1,300,000 gross tons.

Q. Is that to all customers?

A. Approximately, yes.

Q. App-oximately how much of that tonnage is Berwind's Eureka coal?

A. About a million two. I would like to amend that statement. I think I could be more accurate. To all classes of customers it is about 1,500,000 gross tons.

Q. And how much of that is Berwind's Eureka?

A. About a million three hundred thousand.

Q. And the balance is C-prime coal?

A. Yes.

Q. About how much of the Eureka coal is sold to utility companies?

A. About a million one hundred thousand tons.

Q. Were those figures you gave us approximately the figures representing the sales in 1934 and 1935?

A. I think they are, yes.

Q. What use is made of the coal by the customers who fall into the classification of public utilities?

A. It is for the purpose of making steam.

Q. And what use for the steamship companies?

A. Same purpose.

Q. Has your company represented to the utility companies and the steamship companies, and has it been the practice of your company to represent that Berwind's Eureka Coal is well adapted to produce steam in their plants and steamships?

A. Yes, sir.

[fol. 45] Q. Has your company from time to time made tests in the purchasers' plants for the purpose of showing to such customers that Berwind's Eureka coal is suitable for their needs?

A. It has. In many cases they require tests to be made before they contract.

Q. Is that particularly true in the case of the utility companies?

A. Yes.

Q. Has it been your practice to advise your customers that Berwind's Eureka coal comes only from your mines covering the B seam in Pennsylvania?

A. Yes.

Q. Has the company ever had any coal yards, warehouses, or other facilities for the storage of coal in New York State?

A. It has not.

Q. Will you explain why the company has never had any such facilities?

A. The conditions and character of our business do not require it, as we make deliveries direct to customers from our mines via the Pennsylvania Railroad and barges and tugboats to destination. They have the storage facilities necessary to protect their coal supply.

Q. What facilities does your company have for the delivery of coal sold to purchasers in New York City?

A. Barges, tugboats, water borne delivery from Jersey City.

Q. Do you own railroad cars?

A. We do.

Q. What are those cars used for?

A. To carry coal from our mines in Pennsylvania to Jersey City, Harsimus Pier.

Q. How long have you had those delivery facilities you described?

A. Approximately 40 years.

Q. What has been the method of the company in making deliveries of coal to purchasers in New York City?

A. During that period it was loaded at our mines in Pennsylvania on railroad cars, shipped via the Pennsylvania Railroad to Harsimus Pier in Jersey City, loaded into [fol. 46] our barges and taken by our tugboats alongside the plants of our customers.

Q. Or the steamships?

A. Or the steamships. Our customers include steamship companies.

Q. During 1934 and 1935 and the years prior to that do you know whether any producer or seller of coal in the New York City market had similar facilities for delivery that your company had?

A. I think not.

Q. Why does your company maintain the facilities for delivery that you described?

A. In order to assure the public utilities and large consumers of coal in New York a steady flow of coal from the mines to the consumers. Protect them against shortages and delays, etc.

Q. Has it been the practice of the company to represent to your customers in New York City that it has the facilities which you have described for the delivery of coal from the mines to their plants and steamships?

A. Yes.

Q. In 1934 and 1935, did you negotiate and complete the making of contracts for the sale of coal to the following:

Interborough Rapid Transit Company
Brooklyn Edison Company
New York Edison Company
United Electric Light & Power Company
Williamsburgh Power Plant Corporation
New England Steamship Company?

A. Yes.

Q. For how many years prior to the making of such contracts had Berwind-White been selling coal to each of these companies?

A. To the Interborough Rapid Transit Company, approximately 30 years, 35 years.

[fol. 47] Q. During all these years was the coal sold to each of these companies Berwind's Eureka coal?

A. It was.

Q. During all those years was the coal delivered to each of those customers coal actually mined from the B seam in Pennsylvania?

A. It was.

Q. And during all those years was the coal so mined transported from the mines over the Pennsylvania Railroad in your company's cars to Harsimus Pier in Jersey City, and then shipped by barge to the customers' plants?

A. It was.

Q. Was it ever the practice of your company to make deliveries in any other manner?

A. No.

Q. Has your company ever purchased coal from dealers in New York State for the purpose of sale to any of its customers in New York City?

A. No.

Q. Did you receive an invitation to bid from the Receivers of the Interborough Rapid Transit Company in February, 1934?

A. Yes.

Q. I show you this document and ask you whether that is the invitation to bid?

A. It is.

Mr. Lyons: If I may, I would like to introduce copies in substitution for these originals, because they are the records of the company.

Mr. Herman: That is all right.

Mr. Lyons: I offer that in evidence.

(Received and marked Taxpayer's Exhibit 5.)

Q. Did you submit a bid in respect to that invitation?

A. I did.

[fol. 48] Q. Is that the bid?

A. That is the bid.

Mr. Lyons: Would you like to look at the originals of these (handing to Mr. Herman)?

Mr. Baum: Is the copy conformed?

Mr. Lyons: Yes, I offer that in evidence.

Mr. Herman: No objection.

(Received and marked Taxpayer's Exhibit 6.)

Q. This bid states that the coal is to be Berwind's Eureka. Is that the coal produced from the B seam which you have described?

A. That is correct.

Q. It also states "Delivery conditions similar to last year." What does that mean?

A. That means that the conditions under which we have been delivering our coal, namely, delivered, shipped from our mines in our own railway cars to Harsimus Pier, Jersey City, put into our barges and delivered alongside plant.

Q. The bid also states, and I quote this, "This coal is transported from our mines to New York entirely over the Pennsylvania Railroad—shipping point being Windber, Pa." Does that state the complete route to the plant or merely the route on which the coal traveled by rail?

A. Only the route that the coal traveled by rail.

Q. Then that is an incomplete statement?

A. Yes.

Q. Was your bid accepted?

A. It was.

Q. Is this the letter from the Interborough Rapid Transit Co. accepting the bid (handing)?

A. That is it.

Mr. Lyons: I offer that in evidence.

(Received and marked Taxpayer's Exhibit 7.)

[fol. 49] Q. Following the acceptance of that bid, was a formal contract executed?

A. It was.

Q. Dated April 1st, 1934, covering the period April 1, 1934 to March 31, 1395. I show you that document. Is that the contract?

A. Correct.

Q. You signed that contract, did you?

A. I did.

Mr. Lyons: I offer that in evidence.

(Received and marked Taxpayer's Exhibit 8.)

Mr. Lyons: Let the record show that it has been agreed that all these documents that have been offered in evidence, copies of them have been accepted in lieu of the original.

Mr. Herman: So agreed.

Q. In January, 1935, did you submit a bid to the Receivers of the Interborough Rapid Transit Company with respect to its coal requirements for the period, annual period beginning April 1, 1935?

A. I did.

Q. Is that the bid you submitted (handing)?

A. That is it.

Q. Was that bid accepted?

A. Yes.

Mr. Lyons: I offer that in evidence.

(Received and marked Taxpayer's Exhibit 9.)

Q. Was that bid accepted.

A. It was.

Mr. Lyons: I offer that acceptance in evidence.

(Received and marked Taxpayer's Exhibit 10.)

[fol. 50] Q. Following the acceptance of that bid, did you make that contract (handing)?

A. I did.

Mr. Lyons: I offer that in evidence.

(Received and marked Taxpayer's Exhibit 11.)

Q. In negotiating these contracts, Mr. Dunlap, did you follow the practice that you have testified to of making representations to the Interborough as to the source, quality and delivery practice that would be followed with respect to the coal covered by those contracts?

A. I did.

Q. The subject matter of these contracts, Exhibits 8 and 11, is stated to be "Interborough's Standard A coal," and the contracts state certain specifications as to carbon, volatile matter, ash, etc. Does Berwind's Eureka coal meet those requirements?

A. It must.

Q. Was that coal required to be delivered under these contracts?

A. It was.

Q. Did your company produce from its mines in Pennsylvania the required quantities of Berwind's Eureka coal and deliver such coal alongside the plants of the Interborough Rapid Transit Company, and were all those deliveries

made by shipment over the Pennsylvania Railroad from the mines to Harsimus Pier in Jersey City, and from there by barge to the respective plants of the Interborough?

A. That is correct.

Q. These contracts provide that the price is based upon present railroad rates and should there be any change in such rates during the life of the contract, the price is to be increased or decreased accordingly.

Mr. Baum: I don't want to interrupt, but do not the contracts speak for themselves?

[fol. 51] Mr. Lyons: I am describing a provision of the contract and I am going to ask Mr. Dunlap a question with respect to that which requires some explanation.

(Discussion not recorded.)

Mr. Baum: The contract itself doesn't say anything about it. The contract contains the very best evidence and the only evidence is the contract itself. How can the parties vary the terms of a written instrument?

Mr. Lyons: We can ask what they understand the terms to mean.

Mr. Baum: And if the parties get together and say it means something else.

Mr. Lyons: Their own construction of the contract.

Mr. Baum: I am going to object formally to any questions relating to terms of the contract because the contract is the best evidence between the parties and speaks for itself. The Court and this tribunal will make a reasonable interpretation of the terms of the contract. Anything else is surplus and has no bearing and has no weight. You have offered the contracts. Now if there is material that is not in the contract which you think ought to be brought out, negotiations prior or subsequent.

Mr. Lyons: I am perfectly willing to withdraw the question we asked as to what coal is required to be delivered under the contract.

Mr. Baum: There is nothing in the contract about Eureka coal. This second Interborough contract. Your question assumed it was in the contract. Wouldn't the best thing be to let the contract speak?

[fol. 52] Mr. Lyons: There are certain provisions in them I would like to have the witness who signed the contract explain. I think we are entitled to explain certain provisions that might not be clear.

Mr. Herman: Well, why don't you ask a question and if you wish to object, make your objection and it will be sustained or overruled.

Mr. Baum: In the hearings before the Comptroller, the practice is always to give the Taxpayer a great deal of leeway. The strict rules of evidence are not adhered to. That is why I hesitated to interrupt Mr. Lyons in the presentation of his case, but where something comes in that will tend to vary a written instrument that has been submitted, we really should not receive any evidence in that regard.

Mr. Lyons: I don't want to ask him to vary the document at all.

Mr. Baum: Let me ask him one question.

Mr. Lyons: When I asked him what railroad rates were meant I am not trying to vary the document, I am trying to explain the term railroad rates.

Mr. Baum: Well, just one question on preliminary cross-examination of Mr. Dunlap. Does this contract contain all the rights, agreements and obligations of the parties thereunder?

The Witness: I should assume so, yes, it does.

Mr. Baum: Well, then, I don't see that there is anything else that can be offered but the contract itself.

(Discussion not recorded.)

[fol. 53] Mr. Lyons: It refers to railroad rates and it refers to mines. I think we are entitled to bring out what railroad rates and what mines were meant.

Mr. Baum: Will you indicate what section and page you are referring to on that.

Mr. Lyons: Take page 2-a of this contract, the first contract, April, 1934. That provides, in paragraph 1, "The seller reserves the right to incur obligations for the sale of coal from its mines during all periods when deliveries required under outstanding obligations, plus requirements for Seller's coke ovens, do not in the aggregate exceed the physical capacity of said mines." I want to ask him what that means.

Mr. Baum: That is to say, what mines he had in mind.

Mr. Lyons: Then I will ask the other party to the contract what mines he meant by that provision.

Mr. Baum: That is the very point. The parties said "mines." It doesn't make any difference what mines they

said, so far as they were concerned. It was good enough for them to write it into the contract.

Mr. Herman: Let's get the question and object to the specific question.

By Mr. Lyons:

Q. These contracts provide that the price is based upon certain railroad rates and should there be any change in such rates during the life of the contract the price is to be increased or decreased accordingly. To what railroad rates does that refer?

Mr. Baum: Where does that refer to?

Mr. Lyons: Paragraph 6, page 4.

[fol. 54] Mr. Baum: I object to that. I don't see that it has any material bearing on this case. It might be any railroad or any method of shipment that the Taxpayer could make.

Mr. Lyons: Our position is that this contract contemplated shipments from the seller's mines.

Mr. Herman: Objection sustained.

Mr. Lyons: Exception. Let the record show that I offer to prove that the rates referred to in the contracts were the rates covering shipments from the mines of the company over the Pennsylvania Railroad to Harsimus Pier, Jersey City.

By Mr. Lyons:

Q. These contracts provide that "the Seller reserves the right to incur obligations for the sale of coal from its mines during all periods when deliveries required under outstanding obligations, plus requirements for Seller's coke ovens, do not in the aggregate exceed the physical capacity of said mines." To what mines does that refer?

A. The mines in Somerset County, Pennsylvania.

Q. The contracts provide that "In the event of contingencies or causes restricting the production or shipment from the Seller's mines, the Buyer shall be entitled to receive hereunder in any one month only that proportion of the tonnage herein contracted as actual total shipments in available coal car equipment bear to (a) rated capacity of said mines or to (b) physical capacity of said mines in case rated capacity shall have been reduced by contingencies or causes

of the character herein referred to." To what mines does that refer to?

[fol. 55] Mr. Baum: That is objected to as varying the terms of this contract by oral statements that form an inherent part of the contract if they were intended by the parties to be a part of the contract.

Mr. Herman: Objection sustained.

Mr. Lyons: Exception. I offer to prove that the mines referred to in that provision were the mines of Berwind-White Coal Mining Company in Pennsylvania.

By Mr. Lyons:

Q. These contracts further provide that the Seller agrees to "pro rate available facilities for delivery among all of its customers so affected, including Buyer, in proportion to the amount of coal that each is entitled to receive." To what delivery facilities does that refer?

A. To our railway cars and our barges and tugboats.

Q. Did you sign a contract with the New York Edison Company on or about February 7, 1934?

A. I did.

Q. Is that the contract (handing)?

A. It is.

Mr. Lyons: I offer that in evidence.

Mr. Baum: I presume you want to ask the same type questions in regard to all the contracts regarding delivery with regard to particular railroads or particular mine?

Mr. Lyons: Not necessarily. Some contracts state it. We have certain questions to ask with respect to each of these contracts, more or less, with respect to the me ning of certain provisions of the contract.

(Received and marked Taxpayer's Exhibit 12.)

[fol. 56] Q. Did you sign a contract with the New York Edison Company dated January 4, 1935?

A. I did.

Q. Is that the contract (handing)?

A. It is.

Mr. Lyons: I offer that in evidence.

(Received and marked Taxpayer's Exhibit 13.)

Q. Did you sign a contract with the New York Edison Company dated January 4, 1935, covering the period June 17, 1935, to March 31, 1936?

A. I did.

Q. Is that the contract?

A. It is.

Mr. Lyons: I offer it in evidence.

(Received and marked Taxpayer's Exhibit 14.)

Q. Did you sign a contract with the United Electric Light & Power Company dated January 4, 1935, covering the period April 1, 1935, to June 16, 1935?

A. I did.

Q. Is that the contract?

A. It is.

Mr. Lyons: I offer it in evidence.

(Received and marked Taxpayer's Exhibit 15.)

Q. Did you sign a contract with the United Electric Light & Power Company dated January 4, 1935, covering the period June 17, 1935, to March 31, 1936?

A. Yes.

Q. Is that the contract?

A. Yes.

Mr. Lyons: I offer it in evidence.

(Received and marked Taxpayer's Exhibit 16.)

[fol. 57] Q. In negotiating these contracts, Mr. Dunlap, did you follow the practice that you have testified to of making representations to these customers as to the source, quality and delivery practice that would be followed with respect to the coal covered by these contracts?

A. Yes.

Q. Pursuant to the contracts with New York Edison Company and United Electric Light & Power Company which have just been introduced in evidence, did your company produce from its mines the required amounts of coal and deliver such coal alongside the plants of New York Edison and United Electric Light & Power Companies during 1934 and 1935?

Mr. Baum: That is objected to. It doesn't make a hoot of a difference what they did. The agreement is the thing

that is going to control the obligations and rights of these parties.

Mr. Lyons: We are entitled to show what they did under the contract.

Mr. Baum: I will withdraw that objection.

A. We did.

Q. And were all those deliveries made by shipment over the Pennsylvania Railroad from the mines of the company to Harsimus Pier in Jersey City and from there by barge to the respective plants of those two companies?

A. Yes.

Q. Mr. Dunlap, the contract dated February 7, 1934, between Berwind-White and New York Edison Company covers 220,000 gross tons of Standard Eureka run of mine and 180,000 gross tons of 2-inch nut and slack B seam [fol. 58] bituminous coal from the seller's mines in Cambria and Somerset counties, Pennsylvania.

Mr. Baum: What exhibit is that?

Mr. Lyons: That is Exhibit 12. Let the record show that is Exhibit 12.

Q. (Continuing) Will you explain, Mr. Dunlap, the difference between the two types of coal referred to there—Standard Eureka and 2-inch nut and slack B seam bituminous coal?

A. The same character from the same seam, but the 2-inch nut and slack is all coal that passes through a 2-inch screen.

Q. Are they produced from the same mines?

A. Exactly.

Q. All these contracts provided for reduction of price "if at any time during the period of this contract the Seller shall sell any coal of the same grade as that to be delivered hereunder from the mines at a price less than that specified herein." To what mines does that refer?

Mr. Baum: That is objected to on the same grounds as heretofore given.

Mr. Herman: Objection sustained.

Mr. Lyons: Exception. I offer to prove that the mines referred to are the mines of the company in Pennsylvania.

Q. These contracts contain a provision that the prices stated therein are based "on the present rate of wages paid

to miners and day laborers at the above mine or mines of the Seller and upon the present railroad freight rates from these mines to New York tidewater." Will you explain what is meant by "railroad freight rates from the mines to New York tidewater"?

[fol. 59] Mr. Herman: That is the same type of question that was asked previously that was objected to before.

Mr. Baum: Same objection. There is a general objection to all these questions along that line, as to whether we are going to interpret the contract.

Mr. Lyons: Same exception. I offer to prove that the freight rates referred to are the rates from the mines over the Pennsylvania Railroad to Harsimus Pier, Jersey City, and from there by barge to the buyer's plant. Rates fixed by the Interstate Commerce Commission.

Q. Mr. Dunlap, at the time you signed all these contracts, did you own any mines anywhere, except in central Pennsylvania?

A. In West Virginia; ownership.

Q. Did the company own any such mines?

A. No.

Mr. Baum: What did you mean by saying you had mines in West Virginia?

The Witness: There are certain mines in West Virginia that we are sales agent for. I did not quite understand what he meant by ownership.

Q. Did the Berwind-White Coal Mining Company sell any coal produced from the mines in West Virginia to the consumers in New York City during 1934 and 1935?

A. To my knowledge, no.

Q. I will ask you another question. Berwind's Eureka coal, is that coal produced anywhere except in the mines in Pennsylvania?

A. No.

Q. On or about February 6, 1934, did you sign a contract with the Brooklyn Edison Company?

A. Yes.

[fol. 60] Q. Is this the contract (handing)?

A. It is.

Mr. Lyons: I offer that in evidence.

(Received and marked Taxpayer's Exhibit 17.)

Q. On or about January 3, 1935, did you sign a contract with Brooklyn Edison Company?

A. I did.

Q. Is that the contract (handing)?

A. Yes.

Mr. Lyons: I offer that in evidence.

(Received and marked Taxpayer's Exhibit 18.)

Q. Mr. Dunlap, in negotiating these contracts with the Brooklyn Edison Company, did you follow the practice of making representations to the Brooklyn Edison Company as to the source, the quality and delivery practice that would be followed with respect to this coal?

A. I did.

Q. Pursuant to those contracts did your company produce from its mines in Pennsylvania the required quantities of coal and deliver such coal over the Pennsylvania Railroad to Harsimus Pier and from there by barge alongside the plants of the Brooklyn Edison Company during 1934 and 1935?

A. They did.

Q. These contracts cover Berwind's Standard Eureka run of mine coal from the Eureka mines in Cambria and Somerset counties at or near Windber, Pennsylvania. And those mines cover the B seam to which you testified?

A. Yes.

Q. The contracts also contain a provision that the price is based upon present wages and freight rates. Will you explain what wages and freight rates are referred to?

A. The wages paid to the miners and the freight rates [fol. 61] from Windber, Pennsylvania, over the Pennsylvania Railroad to Harsimus Pier, Jersey City.

Q. On or about May 26, 1934, did you execute a contract with Williamsburgh Power Plant Corporation?

A. Yes.

Q. Is that a copy of the contract (handing)?

A. It is.

Mr. Lyons: I offer that in evidence.

(Received and marked Taxpayer's Exhibit 19.)

Q. On or about January 5, 1935, did you execute a contract with Williamsburgh Power Plant Corporation?

A. Yes.

Q. Is that the contract (handing)?
A. It is.

Mr. Lyons: I offer that in evidence.

(Received and marked Taxpayer's Exhibit 20.)

Q. In negotiating these contracts introduced as Exhibits 19 and 20, did you follow the practice that you have testified to, of making representations to the Williamsburgh Power Plant Corporation as to the source, the quality and delivery practice that would be followed with respect to this specific coal?
A. I did.
Q. Pursuant to those contracts, did your company produce from its mines in Pennsylvania the required quantities of coal and deliver such coal alongside the plant of Williamsburgh Power Plant Corporation during 1934 and 1935?
A. They did.
Q. Were all deliveries made by shipment over the Pennsylvania Railroad from the mines to Harsimus Pier, Jersey City, and from there by barge to the plant of that company?
A. They were.
[fol. 62] Q. These contracts refer to a railroad freight rate of $2.72 per gross ton and provide for a change in price corresponding to a change in freight rate. Is the freight rate referred to the rate for shipment over the Pennsylvania Railroad to Harsimus Pier for trans-shipment by water?
A. It is.

By Mr. Baum:

Q. Did you ever use any other road to make shipments?
A. No.
Q. You used the Pennsylvania Railroad?
A. Pennsylvania Railroad entirely.
Q. Could you use the Lehigh Valley?
A. No.
Q. Could you use the D. L. & W.?
A. No.
Q. Could you use the Erie?
A. No.
Q. Can you use any other road?
A. The only railroad that comes into our mines, that is available to us, is the Pennsylvania Railroad.

Q. Can you use the Lehigh Valley?
A. No.

Mr. Baum: All right.
Mr. Lyons: Thank you.

By Mr. Lyons:

Q. The subject matter of these contracts is Berwind's Standard Eureka run of mine B seam coal from the seller's mines located in Cambria and Somerset counties, Pennsylvania, and the mines are specified as Eureka Nos. 35, 36, 40, 42 and Maryland Shaft Mine owned and operated by the Berwind-White Coal Mining Company. Are those the mines covering the B seam to which you have referred?
A. Yes.
Q. During the years 1934 and 1935, was any coal delivered by your company from any point in the State of [fol. 63] New York to any of the utility companies to which we have referred?
A. No.
Q. At the time you entered into these contracts covering 1934 and 1935, were there any dealers within the city or state of New York, from whom your company could secure Berwind's Standard Eureka coal in sufficient quantities to meet the requirements of any or all of these companies?
A. No.
Q. On or about March 6, 1934, did you sign a contract with New England Steamship Company of New Haven?
A. Yes.
Q. Is that the contract (handing)?
A. Yes.

Mr. Lyons: I offer it in evidence.

(Received and marked Taxpayer's Exhibit 21.)

Q. This contract covers the period from April 1, 1934, to March 31, 1935. During that period were all deliveries of coal made to New England Steamship Company made pursuant to and in accordance with the terms of that contract?
A. They were.
Q. What kind of coal was delivered under that contract?
A. Berwind's Eureka.
Q. Was the coal delivered under that contract delivered by shipment from the mines?

A. It was.
Q. What mines?
A. Mines in Somerset County.

Mr. Lyons: That is all. Do you want to cross-examine.
Mr. Baum: Are you through with your exhibits?
Mr. Lyons: Through with Mr. Dunlap. We have other witnesses to call.
Mr. Baum: I will have to read all these things through to see what there is to question, so suppose you continue [fol. 64] with your case and we will call Mr. Dunlap again, because we will have to meet again.
Mr. Lyons. I was thinking we might relieve Mr. Dunlap. He has been called in several of the purchaser cases. He is president of the company and a very busy man, and these are the only exhibits that we are introducing through him. I would consider it a great help.
Mr. Baum: I can't grasp all of these exhibits as fast as all that. I don't profess to know that much. We will fix a time that is convenient to Mr. Dunlap.
Mr. Lyons: I am sorry, Mr. Dunlap. We will have to call you again.

FREDERICK D. SEYMOUR, Lake Road, Short Hills, New Jersey, after first having been duly sworn, testified as follows:

Direct examination.

By Mr. Lyons:

Q. Are you, Mr. Seymour, the general sales manager of the Berwind-White Coal Mining Company?
A. I am.
Q. How long have you been connected with that company?
A. Since 1930.
Q. Are all the sales made by the company made pursuant to spot contracts or term contracts?
A. They are.
Q. Will you explain what is meant by spot contracts and term contracts?
A. Spot is an order to be filled within a few days and does not contain all the provisions of a term contract, which extends over a period of time—generally over one year—and

[fol. 65] provides for increase or decrease in price on account of wages, and other provisions.

Q. As sales manager of the Berwind-White Coal Mining Company, did you participate in the negotiation of the spot or term contracts for the sale of coal in 1934 and 1935 to the following customers:

Interborough Rapid Transit Company,
New York Edison Company,
United Electric Light & Power Company,
Brooklyn Edison Company,
Williamsburgh Power Plant Corporation,
New England Steamship Company,
Arbuckle Brothers,
Caddell Drydock & Repair Company,
L. A. Dreyfus Company?

A. To some extent in all of them.

Q. In the course of those negotiations, were the purchasers informed as to the quality of Berwind's Eureka coal and Berwind's C-prime coal?

A. They were.

Q. Which of those customers purchased Berwind's C-prime coal?

A. I think the only one you mentioned is Arbuckle Brothers.

Q. Well, the contract covering the Dreyfus Company, I believe, calls for C-prime coal.

A. It does, but none has been delivered.

Q. You mean it calls for C-prime coal or Berwind's Eureka coal, and you deliver Berwind's Eureka?

A. That is correct.

Q. Now, you testified that the only one of these enumerated customers that purchased C-prime coal was Arbuckle Brothers. But all the others purchased Berwind's Eureka?

A. With the exception of the Dreyfus Company, which could purchase C-prime coal. Aside from that, Arbuckle Brothers had a contract for C-prime coal.

[fol. 66] Q. What kind of coal was delivered to Dreyfus?

A. Eureka.

Q. Were those customers who took Eureka coal informed of the fact that the only source from which the company got that coal was from the mines in Pennsylvania? That is, the mines covering the B seam?

A. That is correct.

Q. Were those customers who took the C-prime coal, or that customer, informed that the only source from which the company obtained its coal was from its mines in Pennsylvania covering the C-prime seam?

A. That is correct.

Q. What facilities for delivery from the mines to the consumers does your company have?

A. We have our own cars, which are hauled over the Pennsylvania Railroad; our own barges and tugboats for hauling the barges to New York City.

Q. From what point?

A. From Jersey City. Harsimus Pier.

Q. What advantage does Berwind-White have over other producers with respect to its delivery facilities covering deliveries to New York City customers?

Mr. Baum: That is objected to. What has that got to do with the case, the advantages they have over other producers? We object to that question on the ground of relevancy.

Mr. Lyons: The point is, I want to bring out that Berwind-White has delivery facilities which are particularly adapted to having a constant stream of coal coming in from the mines to the consumers, and that is a very important point to the consumers in making contracts for the purchase of coal from the Berwind-White Company. I want to ask Mr. Seymour what advantage his company has over other companies.

[fol. 67] Mr. Baum: All right, objection withdrawn.

A. Our company owns its own coal cars, and its own barges, and tugs, which allow it—which allow the company—complete control of the shipment from the mine to a consumer in New York Harbor having coal delivered alongside.

Q. Do you know whether any other producer and seller of coal with the same market has the same facilities?

A. To my knowledge, there are no other coal suppliers who own their own facilities.

Q. Were those purchasers which we have mentioned informed prior to the making of their contracts covering deliveries in 1934 and 1935 that those deliveries would be made to them by Berwind-White directly from its mines to their plants?

A. That is right.

Q. Is it your practice to emphasize your facilities for delivery with respect to deliveries of coal?

Mr. Baum: That is objected to. This man is a salesman. He can make any statement but what would that have to do in the selling of coal so far as the actual rights and liabilities of the parties under the contract are concerned? He can promise the world and do you want to prove what is done by what a salesman promises to a customer?

Mr. Lyons: I can connect that up by testimony of the purchasers, as to what points they had in mind in making these contracts.

Mr. Baum: You want to tie up his promise with the hope and anticipation of the purchaser, but no legal rights that may vary the terms of a written instrument?

Mr. Lyons: No, no. We are trying to establish that the practice represents a course of dealing——

[fol. 68] Mr. Baum: Let's see how he deals with these people, but what difference does it make what he tells these people.

Mr. Lyons: I don't care about that question. I will withdraw it.

By Mr. Lyons:

Q. Were any sales of coal made to Arbuckle Brothers by your company between December 10, 1934, and December 31, 1934?

A. Not to my knowledge.

Q. Did you negotiate and sign a contract on or about December 10, 1934, covering deliveries of coal for the calendar year 1935 with Arbuckle Brothers?

A. I did.

Q. Is this the contract (handing)?

A. Yes.

Mr. Lyons: I offer it in evidence.

(Received and marked Taxpayer's Exhibit 22.)

(Recess)

Mr. Lyons: Mr. Seymour wants to correct a statement he made with respect to sales of C-prime coal.

The Witness: I believe I am incorrect on the Dreyfus, whereas the contract is written for both Eureka and C-prime coal the deliveries were actually made in C-prime.

Q. So that you delivered C-prime during this period to both Dreyfus and Arbuckle Brothers?

A. Yes.

Q. In negotiating that contract, Mr. Seymour, did you follow the practice that you have testified to, in informing the company, the purchaser, as to the source, the quality and delivery practice to be followed with respect to the coal [fol. 69] covered by the contract?

A. That is correct. I would like to insert there that some of my salesmen also took part.

Q. But you are the general sales manager and you had supervision of those sales?

A. That is right.

Q. And Arbuckle Brothers was informed that the coal was Berwind's C-prime to be shipped from the mines in Pennsylvania to the plant of Arbuckle Brothers over the Pennsylvania Railroad to Harsimus Pier and then by barge to the plant?

A. That is correct.

Q. Had you sold coal to Arbuckle Brothers in prior years?

A. Yes.

Q. Approximately how long?

A. I would say one or two years.

Q. During those years, was the coal delivered to Arbuckle Brothers in accordance with that same delivery practice that you testified to?

A. Yes.

Q. The contract provides, under the heading "Kind and Grade of Coal," Berwind's C-prime ¾ inch slack from Mine No. 37 and/or No. 40 at the option of the seller subject to the approval of the buyer. Where are those mines, Nos. 37 and 40, located?

A. Somerset County, Pennsylvania.

Q. How were the deliveries of coal made under this contract?

A. Made by dumping coal at the mines into the railroad cars, transporting it over the Pennsylvania Railroad to Harsimus Pier, Jersey City, dumping the coal from the cars

into our barges and towing it and dumping it alongside the Arbuckle Brothers plant.

Q. Did you negotiate and sign a contract on or about June 30, 1934, with L. A. Dreyfus Company for the sale of coal covering the period August 1, 1934, to July 31, 1935?

A. That is right.

[fol. 70] Q. Is this the contract (handing)?

A. That is the contract.

Mr. Lyons: I offer it in evidence.

(Received and marked Taxpayer's Exhibit 23.)

Q. On or about July 29, 1935, did you negotiate and sign a contract with L. A. Dreyfus covering the period August 1, 1935, to July 31, 1936?

A. I did.

Q. Is that the contract (handing)?

A. That is the contract.

Mr. Lyons: I offer that in evidence.

(Received and marked Taxpayer's Exhibit 24.)

Q. In negotiating those two Dreyfus contracts, did you follow the practice that you have testified to of informing the Dreyfus Company as to the source, the quality and delivery practice to be followed with respect to the coal covered by the contracts?

A. In the case of Dreyfus, that practice has been of such long standing that it was not necessary, and the coal was bought on that basis. Practically no negotiations were held in regard to that contract other than past experience.

Q. How long have you sold coal to Dreyfus?

A. To my knowledge, since 1930, when I came with the company, and for many years before that.

Q. During those years was the coal delivered to the Dreyfus Company in accordance with the regular practice which you have described?

A. That is correct.

Q. And how was the coal delivered under these two contracts? Was it in the same way it was delivered to Arbuckle Brothers?

A. That is correct.

[fol. 71] Q. Did you make sales of coal to Caddell Drydock & Repair Company during the period from December 10, 1934, to December 31, 1935?

A. That is correct.

Q. How long have you been selling coal to them?

A. To my knowledge since 1930 and many years before.

Q. Will you describe the manner in which you obtained orders for coal from Caddell Drydock & Repair Company and their requirements with respect to quality, source and delivery?

A. Those orders are received by telephone and entered as an order by us without any correspondence and based entirely on past practice and experience.

Q. What were the requirements of those orders with respect to quality?

A. Eureka coal.

Q. Source?

A. From Pennsylvania.

Q. Your mines?

A. In Somerset County.

Q. What about delivery?

A. By barge as in the case of Arbuckle Brothers.

Q. Did you make deliveries pursuant to those requirements?

A. Deliveries were made pursuant to those requirements.

Q. In the same way?

A. Same manner as Arbuckle and Dreyfus.

Q. Did you negotiate sales of coal to the New England Steamship Company during the period March 31, 1935, to December 31, 1935?

A. Yes.

Q. Will you state how those sales were made?

A. Those sales were made as a continuation of the contract expiring March 31.

Q. 1935?

A. 1935, on a spot basis, with no contract, inasmuch as I recall that there was a dispute on the price. The price was accepted subject to change without notice and shipments were continued in the same manner as the previous contract.

[fol. 72] Q. In other words, the terms of these spot orders were precisely the same as the written contract that expired on March 31, 1935?

A. That was understood between the parties.

Q. Same as to deliveries and source?

A. Yes.

Q. But different as to price?

A. I believe the price continued, but I would not want to say.

Mr. Herman: What do you mean by spot orders?

The Witness: A sale is made at a price under the prevailing conditions. No other conditions applied, such as wage increase and change in freight rate, and it is for immediate shipment.

By Mr. Lyons:

Q. The usual manner of receiving a spot order, is that over the telephone?

A. Sometimes over the telephone, sometimes confirmed in writing.

Q. Did you negotiate sales of coal to Austin, Nichols & Company for the period December 10, 1934, to December 31, 1935?

A. I did through salesmen.

Q. Were those sales spot sales?

A. Spot sales.

Q. What kind of coal was required by those spot orders?

A. C-prime coal.

Q. What was the requirement of those orders with respect to the source of the coal?

A. Delivered from our mines in Somerset County, Pennsylvania.

Q. I show you this document and ask you whether that is an order that you received from Austin, Nichols & Company during the period?

A. That is an order received during the period in question.

Mr. Lyons: I offer that in evidence.

(Received and marked Taxpayer's Exhibit 25.)

[fol. 73] Q. I notice that that order states the terms as F. O. B. delivered mine 30. What does that mean?

A. That means that the price and delivery took place F. O. B. the mine, free on board cars at the mine, the buyer paying the freight to destination.

Q. In other words, your delivery pursuant to this order was complete upon delivering the coal on board the cars at the mine?

A. That is correct.

Mr. Baum: Is that your general practice?

The Witness: It is a general practice where the coal is not for trans-shipment, in New York Harbor, in the City of New York.

Mr. Baum: Where the coal is for trans-shipment in the City of New York, that is not the practice, is it?

The Witness: No, except in very small quantities, such as one car load.

By Mr. Lyons:

Q. Do you make F. O. B. mine deliveries——

A. (interrupting) Let me just finish that answer again. In some cases a plant location is such that they canno 'ake it by barge, only by railroad car. That also has a bearing.

Q. Did you make deliveries F. O. B. mine to any other customers, in New York City, to any other consumers, in New York City, during this period?

A. I believe not. It is an unusual delivery in the City of New York.

Q. And not in accordance with your general practice?

A. It is not.

Q. I show you a carbon copy of a letter addressed to Austin, Nichols & Company, dated December 27, 1934, and [fol. 74] ask you whether that is an acceptance of the order from Austin, Nichols & Company, in evidence as Exhibit 25?

A. It is.

Mr. Lyons: I offer that in evidence.

(Received and marked Taxpayer's Exhibit 26.)

Q. Were all other deliveries to Austin, Nichols & Company made pursuant to the same type of spot orders during the period?

A. That is right.

Q. Were all deliveries to Austin, Nichols & Company in this period at the mines?

A. All deliveries were made F. O. B. the mines.

Q. And in all cases the source of the coal was the mines in Pennsylvania?

A. That is correct.

Q. During the period December 10, 1934, to December 31, 1935, were any deliveries of coal made to any of your customers from any point within the State of New York?

A. No.

Q. Has it ever been the practice of your company to make deliveries of coal to New York City customers from any point in the State of New York?

A. No.

Q. Were any deliveries pursuant to spot contracts made during the period December 10, 1934, to December 31, 1935, to customers with whom the company had term contracts?

A. I did not get the question.

Q. The customers who had term contracts, did they receive delivery pursuant to those contracts?

A. Yes.

Q. And while they had term contracts did they ever receive any deliveries pursuant to spot orders?

A. No.

Q. And the deliveries made to customers pursuant to spot orders; conversely, were not made to those customers while there were any term contracts in existence?

A. That is right.

Mr. Lyons: All right, Mr. Seymour.

[fol. 75] Frank E. Ward, of 45 Christopher Street, New York, N. Y., after first having been duly sworn, testified as follows:

Direct examination.

By Mr. Lyons:

Q. Mr. Ward, are you an auditor employed by Berwind-White Coal Mining Company?

A. Yes.

Q. I show you this statement which has been marked for identification as Exhibit 4, and ask you whether you prepared that statement from the records of the company?

A. I did.

Mr. Lyons: I offer this in evidence as Exhibit 4, as a statement of the correct figures representing sales by Berwind-White to those customers in connection with whom sales tax has been assessed for the period from December 10, 1934, to December 31, 1935.

Mr. Herman: It is stipulated that the statement which the Taxpayer has offered in evidence contains the correct figures for the purposes of this hearing.

(Taxpayer's Exhibit 4 for Identification marked in evidence.)

GEORGE MCCREE, of 142 Manor Avenue, Hempstead, N. Y., after first having been duly sworn, testified as follows:

Direct examination.

By Mr. Lyons:

Q. What is your position with the Berwind-White Coal Mining Company?

A. Assistant manager of the bunkering department.

Q. How long have you been associated with the company?

A. Since May, 1933.

[fol. 76] Q. Are you charged with the negotiation of contracts for the sale of coal to steamship companies?

A. Yes.

Q. In 1934 and 1935 did you negotiate contracts on behalf of the Berwind-White Coal Mining Company with the following customers:

All-America Cables,
Clyde-Mallory Lines,
French Line,
International Mercantile Marine Company,
New York & Porto Rico Steamship Company,
North Atlantic & Gulf Steamship Company,
Ocean Dominion Steamship Corporation,
Spanish Line.
U. S. Navigation Company, and
Pioneer Terminal Corporation?

A. Yes.

Q. Were all sales during this period made pursuant to either a spot or term contract?

A. Yes; one or the other.

Q. Which sales were made pursuant to spot contracts?

A. The U. S. Navigation Company is one, and North Atlantic and Gulf Steamship Company and Pioneer Terminal Corporation are probably spot sales.

Q. And the others were pursuant to contracts?

A. Term contracts.

Q. What kind of coal has it been the practice of the company to sell to these steamship companies?

A. They have always specified for Berwind's Standard Eureka Coal,—that is what we term it in the bunkering department.

Q. And that coal is used by the steamship companies for producing steam?

A. Yes, that is what they use it for.

Q. Had your company sold coal to these purchasers prior to 1934?

A. Yes.

[fol. 77] Q. Has it been your practice in negotiating contracts for the sale of coal with these customers to make representations to them with respect to the quality, source and Berwind-White facilities for delivery of the coal to consumers in New York Harbor?

A. Yes.

Q. What representations was it your practice to make?

Mr. Baum: I object to that question.

Mr. Lyons: I am asking him the question with respect to the course of dealing of the company over a long period of years in connection with the same customers, and I submit that I am entitled to show a course of dealing in connection with the issue of interstate commerce.

Mr. Baum: But you are asking him what he says to the customer as to the quality of the coal and that sort of thing. How can that be binding on us? Is it any better than the testimony given by the last witness as to how it helps to sell the coal?

Mr. Lyons: Well, we are entitled to show what the purchasers rely on in making these contracts.

Mr. Baum: The fact that he made any statement does not prove anything at all that these people relied on it.

Mr. Lyons: Well, we are calling the customers later. We cannot call them all at the same time. But we are entitled to show what passes by way of information between buyer and seller.

Mr. Baum: I think this is immaterial, but make no formal objection.

[fol. 78] A. We represent the coal to be Berwind Standard Eureka, and inform them where it is produced, the class of coal that it is, the seam it is produced from.

Q. What is that?

A. The Miller or the B seam in Pennsylvania. We find that buyers are very well informed as to the different kinds of coal in those fields, and it behooves us to tell them what our properties are and where they are and what our facili-

ties are—we have our own cars and we have our own barges and tugs.

Q. What do you use those cars and barges for?

A. For transporting the Standard Eureka coal to the Harsimus Pier.

Q. From where?

A. From the Eureka mines in Somerset County, Windber, Pennsylvania.

Q. And what do you use the barges for?

A. We dump the coal that comes in the cars into the barges and have the barges towed alongside steamships.

Q. How long have you been selling coal to these companies that were mentioned above?

A. Personally I have been doing it for four years for Berwind-White Coal Mining Company, and prior to that many of these companies are on record as being contractors for a great number of years.

Q. Did you participate in the negotiating of the contracts covering the calendar year 1934 and 1935 with All-America Cables?

A. Yes.

Q. I show you this contract dated November 25, 1933, and ask whether you signed that contract?

A. Yes.

Mr. Lyons: I offer it in evidence.

(Received and marked Taxpayer's Exhibit 27.)

Q. I show you document dated December 3, 1934, purporting to be a contract between All-America Cables and Ber- [fol. 79] wind-White Coal Mining Company, and ask you whether you signed that contract?

A. Yes.

Mr. Lyons: I offer it in evidence.

(Received and marked Taxpayer's Exhibit 28.)

Mr. Lyons: Will you stipulate to accept the contracts with the Clyde-Mallory Lines, French Line, International Mercantile Marine, New York & Porto Rico Steamship Company and Spanish Line in evidence?

Mr. Herman: Yes.

(Received and marked Taxpayer's Exhibits 29, 30, 31, 32, 33, 34, 35, 36, 37, and 38, respectively.)

Q. Mr. McCree, these contracts are all in the same form, are they not?

A. Yes.

Q. Will you describe your practice with respect to making the deliveries of coal to customers under these contracts just introduced in evidence?

A. When we conclude a term contract, we are very watchful of the steamers that belong to the contracting party. We draw it to their attention that we notice that the steamers will be in the port of New York at such and such a time, and ask them if they require any deliveries of coal under those contracts.

Q. Those contracts are all "requirements" contracts?

A. Yes, they are all "requirement" term contracts. They invariably tell us what their requirements are, and we make arrangements to make delivery in accordance with their requirements. We put the orders through in the usual manner, through the marine department up to the mines at Windber. They ship the coal onto the cars at Pennsylvania [fol. 80] Railroad to Harsimus pier and dump it into the barges and deliver alongside their ship at the time they want it.

Q. All these contracts provide for an adjustment in the event of a change in railway rates or in wages. To what railway rates and wages does this provision refer?

A. That refers to the railroad rates in existence under the Interstate Commerce Commission between the mines in Windber and the Harsimus Pier.

Q. In Jersey City?

A. Yes.

Q. And what wages are referred to?

A. The wages referred to are the miners' wages at the mines at Windber.

Q. Were all deliveries made pursuant to these contracts that are in evidence, during the period December 10, 1934, to December 31, 1935?

A. They were.

Q. How were they made?

A. In the usual manner that I have described.

Q. Will you state it again?

A. We keep in touch with them——

Q. (Interrupting.) Never mind; that is on the record. Did you participate in the negotiation of spot contracts with the U. S. Navigation Company, Pioneer Terminal Cor-

poration and North Atlantic & Gulf Steamship Company during the period December 10, 1934 and December 31, 1935?

A. Yes.

Q. Will you state how those spot contracts were made and fulfilled?

A. Usually orally. We solicit them, represent our coal to them, and they usually place their order when we represent to them what we have to sell and the price.

Q. What are the requirements of those orders with respect to quality, source and delivery of the coal?

A. We inform them we have our Eureka coal for sale and [fol. 81] we can deliver it alongside to suit their requirements and then they place their order on that basis for the price and for method of delivery on our representation that it is Eureka coal.

Q. And your representations with respect to delivery cover the general practice that you have described?

A. Yes.

Q. Is all the coal delivered to these spot customers delivered in the manner you have described?

A. Yes.

Q. Did you participate in the negotiation of the contract with Ocean Dominion Steamship Corporation dated March 5, 1934?

A. Yes.

Q. That contract is signed by A. Cory Davies. Will you state whether that is his signature?

A. Yes.

Mr. Lyons: I offer that in evidence.

(Received and marked Taxpayer's Exhibit 39.)

Q. This contract provides, among other things, that "At the other U. S. ports mentioned we agree to purchase our requirements from you insofar as quality, price and conditions can be met by you." The "other U. S. ports mentioned" does that include New York Harbor?

A. Yes.

Q. Will you explain what is meant by "requirements covering quality, price and conditions"?

A. They know that we have Berwind's Eureka in our own barges by our representations.

Q. What is meant by conditions?

A. They know our conditions will be in our own barges, and minimum of 250 tons. That is our usual method of de-

livery. Where they want smaller quantities and lower price, they have the option of purchasing at a lower price from other people who can give that method of delivery that we don't undertake.

[fol. 82] Q. What do you mean by method of delivery?

A. They can take it over alongside the pier in the lower bay of New York.

Q. Will you state what coal was delivered under this contract?

A. Whenever they have taken supplies from us, it has been Berwind's Eureka delivered alongside their steamer in our barges.

Q. At what point?

A. From our mines the coal came in cars to Harsimus, dumped into barges and towed alongside their ships.

Q. Was this contract abrogated or modified in any way prior to December 31, 1935?

A. No.

Mr. Lyons: That is all.

LEROY A. FRENCH, 852 Valley Road, Montclair, N. J., after first having been duly sworn, testified as follows:

Direct examination.

By Mr. Lyons:

Q. Are you the Marine Superintendent of Berwind-White Coal Mining Company?

A. I am.

Q. How long have you been associated with the company?

A. Since 1921.

Q. How long have you been Marine Superintendent?

A. Since 1930.

Q. As Marine Superintendent did you have charge in 1934 and 1935 and prior years of making the deliveries of coal to the customers of Berwind-White in New York City?

A. I did.

Q. Do you know what customers of Berwind-White are involved in this City sales tax matter?

A. Yes.

Q. Do you know what facilities for the receipt of coal each of those customers had in 1934 and 1935?

A. I do.

[fol. 83] Q. Take the utilities?

A. All the utilities, on account of the physical location of the plants, are along the water front, on deep water.

Q. How are their plants constructed with respect to the receipt of coal?

A. Only for water borne delivery.

Q. Will you describe the plant structure covering the receipt of coal?

A. Practically all the bunkers for the power houses in New York City are above the ground level some 3 to 7 stories high. It is taken from the barges by derricks and diggers and it is then hoisted up and dumped into a hopper and by belt conveyors into the bunkers. That is to assure gravity feed.

Q. And that part of the plant is on the water front?

A. All on the water front. There is no means for taking coal in any place except by the water side.

Q. Would you say that it was possible to receive coal in a steady stream into those plants in any way except by barge?

A. Not in the quantities they use.

Q. That covers the utilities. What about the steamship companies?

A. All the steamship companies are on the water, naturally.

Q. You deliver alongside the steamer?

A. Alongside the steamer, placed on board by the same method, little derricks and buckets hoisted and dumped into the bunkers. It is impossible to deliver to a steamer from the dock side.

Q. And the industrial companies that receive coal?

A. All the industrial companies are along the water front. That is the only way to get coal to them. Most of these small plants have no railroad spurs or anything else connected with them.

Q. What about Austin, Nichols?

A. I would not know about Austin, Nichols.

[fol. 84] Q. Approximately how many tons a week did you deliver to the Interborough Rapid Transit Company during 1934 and 1935?

A. Approximately 8,000 tons per week.

Q. What about New York Edison Company?

A. Approximately 8,000 tons per week.

Q. That includes United Electric Light & Power Company?

A. That includes the Hell Gate plant and the 40th Street plant.

Q. Brooklyn Edison?

A. About 9,000 tons a week.

Q. Williamsburgh Power Plant Corporation?

A. Approximately 2,000 tons a week.

Q. Has it been your experience that the utility companies require a constant stream of deliveries of coal?

A. Yes.

Q. According to the testimony you gave before, the total weekly tonnage delivered to the utility companies apart from the other customers runs between 25,000 and 30,000 tons a week in 1934 and 1935?

A. That is correct.

Q. Will you state how you received notice of the delivery requirements of the utility companies in 1934 and 1935?

A. That has been by telephone every Thursday from the utilities, under the terms of the contract, and we compile the total number of tons converted into cars.

Q. Tons required for what?

A. For the various utilities.

Q. For what period?

A. For the following week; and it is transmitted to the mines.

Q. Is any coal mined except upon order?

A. No.

Q. Will you describe the manner in which notice of the requirements of the steamship companies was given to you in 1934 and 1935?

A. We generally watch them, all the steamship companies wanting a large amount of coal, taking 3,000 to 4,000 tons [fol. 85] of coal. Their schedule is projected and we have a copy of their schedule, so we watch the approximate time the steamer will be in from the other side, and we order the coal to be here three or four days before the steamer is to be here.

Mr. Baum: And that coal is a stream from the mines the way the utility coal is?

The Witness: No, that is a block of coal ordered especially for that purpose.

Mr. Baum: The stream is only for the utilities.

The Witness: That is right.

Q. You say that no coal is mined except on order; that is true of the steamship companies as well as of the utility companies?

A. That is right.

Q. Will you describe the procedure that is followed for delivering coal from the mines after the orders have been received there?

A. The coal is shipped from Windber.

Mr. Baum: The witness stated that the order was not received at the mine, the order is received in New York City.

Mr. Lyons: Well, it is transmitted to the mine.

Mr. Baum: That is, you say you transmit the order to the mine?

The Witness: Yes.

Mr. Baum: As far as the customer is concerned, he puts the order in here in New York. The contract is made in New York.

The Witness: Well, I can say on what I am speaking about, he doesn't, it comes from Hoboken.

[fol. 86] By Mr. Lyons:

Q. Well, let's not argue about that, Mr. French. The contract is made in New York?

A. The contract is made in New York.

Q. Will you describe the procedure for delivering coal from the mines after the orders have been transmitted by you?

A. The coal is shipped from Windber to South Fork by Pennsylvania Railroad, and from there to the Juniata scales, just outside of Altoona, where the coal is weighed, and a complete history of the car is made on a railroad bill of lading. From that point the coal is shipped to Harsimus Pier in Jersey City.

Q. How much time do you allow between the time you communicate the orders to the mines and the time you deliver the coal to Harsimus Pier?

A. About 7 days.

Q. What in your experience is the average time that the cars are in transit from the mines to Harsimus Pier?

A. Approximately 5 days.

Q. Why do you allow the additional 2 days?

A. For the mining of the coal.

Q. Is each car that arrives at Harsimus Pier from the mines accompanied by a way bill which designates the weight, the quality of the coal and the source of the coal?

A. It is.

Q. Is this one of the way bills that you have described (handing)?

A. It is.

Mr. Lyons: I offer it in evidence.

(Received and marked Taxpayer's Exhibit 40.)

Q. This way bill states, "From Eureka Colliery 35 Pa". What does that mean?

A. The 35 means the mine it comes from, the number of the mine.

Q. And it says "Classification Davy."

A. That is our trade name for that particular mine.

[fol. 87] Q. Mine No. 35?

A. That is right.

Q. It says "B coal."

A. That means Miller B seam.

Q. Is that the Eureka coal?

A. Yes.

Q. Is that way bill identical in form with the way bill that accompanied every car of coal that arrived at Harsimus Pier from the mines from December 10, 1934, to December 31, 1935?

A. It is.

Q. And that delivery practice that you described before, was that followed in 1935 and 1934?

A. Yes, sir.

Q. What happens to the cars of coal upon their arrival at Harsimus Pier?

A. Dumped into barges.

Q. Are the barges loaded for delivery to particular customers for particular orders?

A. That is right.

Q. What happens to the barges upon their being loaded?

A. Delivered to the customer.

Q. How?

A. By tug.

Q. Is a shipping document made covering each barge shipment?

A. Yes.

Q. I show you this document and ask you whether that is a shipping document covering a shipment in 1935?

A. It is.

Mr. Lyons: I offer it in evidence.

(Received and marked Taxpayer's Exhibit 41.)

Q. Were all deliveries by barge during 1934 and 1935 covered by bills of lading in substantially the same form as Exhibit 41?

A. Yes.

Q. Did a duplicate original bill of lading covering each barge shipment go to the customer for each delivery that was made in 1934 and 1935?

A. It did.

[fol. 88] Q. And did you keep the other duplicate original?

A. Yes.

Q. When the barges arrive at the plants or steamships who does the unloading?

A. The consignee.

Q. When is your delivery complete?

A. Delivered alongside.

Q. When the barge comes alongside?

A. That is right.

Mr. Lyons: That closes that.

Mr. Herman: Hearing adjourned to May 6, 1937, at 10 A. M.

Mr. Herman: This is a continuation of the hearing held April 20, 1937, to review a deficiency assessment made against the Berwind-White Coal Mining Company pursuant to Local Law 20 of 1934 as amended, for the period from December 10, 1934, to December 31, 1935, for the principal sum of $151,088.31, plus penalties and/or interest of $16,429.79, making a total of $167,518.10.

Porter C. Savage, 655 Decatur Street, Brooklyn, N. Y., a witness duly called on behalf of the taxpayer, being duly sworn, testified as follows:

Direct examination.

By Mr. Lyons:

Q. Will you state your full name?

A. Porter C. Savage.

Q. The address?

A. 655 Decatur Street, Brooklyn, residence; business address, 4 Irving Place.

Q. Mr. Savage, in 1934 and 1935 were you employed by the New York Edison Company and the United Electric [fol. 89] Light & Power Company?

A. I was.

Q. In what capacity were you so employed?

A. I was purchasing agent.

Q. And how long have you been employed by those companies?

A. Twenty-odd years.

Q. And what were your duties as purchasing agent, with respect to the purchase of coal?

A. To solicit offers of coal, to investigate those offers and to decide what coal would be purchased.

Q. You participated in the negotiation of contracts for the purchase of coal?

A. I did.

Q. What was the business of those two companies?

A. The generating and distribution and sale of electricity.

Q. And in connection with that business what use do they make of coal?

A. To generate electricity—to make steam to generate electricity.

Q. Will you designate the generator stations which the New York Edison Company had in 1934 and 1935 and prior years, stating the name and location of each station?

A. Waterside No. 1 and No. 2 stations at 38th and 39th Streets in the East River. East River station, at 14th Street and the East River.

Q. Will you designate the generating stations which the United Electric Light & Power Company had in New York?

A. Those two stations I mentioned were New York Edison Company stations.

Q. You mentioned three stations?

A. Three stations, yes; Waterside 1 and 2, and East River were New York Edison Company stations. The United Electric Light & Power Company stations were located at 132nd Street and East River and Sherman Creek at 201st Street and Harlem River.

Q. That makes five stations which you had to keep supplied with coal?

A. That is right.

[fol. 90] Q. Is Consolidated Edison Company of New York the successor of those two companies?

A. Yes.

Q. What was the date of succession, approximately?

A. August 1, 1936.

Q. Those two companies were merged into Consolidated Edison Company?

A. The United Company was merged into the New York Edison Company—wait, I am wrong—on August 1, 1936—1935—August 1, 1935. And those two companies then became the New York Edison Company, Incorporated. That company was merged with the Consolidated Gas Company of New York into the Consolidated Edison Company of New York, Incorporated on December 22, I think, 1936.

Q. And have you been employed by the Consolidated Edison Company as purchasing agent since its organization?

A. Yes.

Q. And you have the same duties?

A. Yes.

Q. Now, going back to the New York Edison Company, and United Electric Light & Power Company, did those companies conduct tests or experiments for different types of coal to determine the particular types that were adaptable for use in their plants?

A. They did.

Q. Was Berwind's Eureka coal among the brands of coal so tested?

A. It was.

Q. And what was disclosed by your tests with respect to Berwind's Eureka coal?

A. That it was a coal of excellent quality and adapted to use in any and all of our power plants.

Q. Had those companies purchased Berwind's Eureka coal from the Berwind-White Coal Company prior to 1934?

A. Yes, for many years.

Q. For approximately how long a period?

A. 25 years.

Q. And approximately what annual quantities were purchased over that period?

[fol. 91] A. Well, it varied from probably 150,000 tons annually to 400,000 tons annually.

Q. What was it in, say, between 1932 and 1935?

A. It is 400,000 tons a year, if my memory serves me correctly.

Q. And has Consolidated Edison Company continued to purchase similar quantities of Berwind's Eureka coal from the Berwind-White Coal Mining Company for use in the same plants?

A. It has.

Q. Have those companies, the predecessors and the successor, ever purchased Berwind's Eureka coal from any other source than Berwind-White?

A. No.

Q. What is the source of Berwind's Eureka coal?

Mr. Baum: Now, that is objected to. What does he know about the source of their coal? He is only interested in the coal that he purchased, he cannot tell what the source is.

By Mr. Baum:

Q. By way of cross-examination, do you go out to these mines?

A. I have been out to the mines.

Q. Do you watch them do the mining?

A. I do not.

Q. Do you supervise their loading into the cars?

A. I do not.

Q. You are at the power house of your concern?

A. I am not. I am in the general office.

Q. In the general office?

A. Yes.

Mr. Baum: Well, will you ask him your question again and see whether it is relevant?

[fol. 92] By Mr. Lyons:

Q. Isn't it one of your duties, Mr. Savage, to see the source of supply for use of your plants?

A. Source of supply, yes.

Q. You know the source of Berwind's Eureka coal?

A. I do.

Q. What is that source?

A. It is Somerset and Cambria Counties in the State of Pennsylvania.

Q. The mines are in that district?

A. The mines are in those counties.

Q. Does the quality of the coal have any particular relation to its source?

A. In that particular territory the "B" seam coal, that is, the seam from which Berwind's Eureka coal comes, is a very high grade seam coal.

Q. Would the coal from other districts in Pennsylvania be of a different quality?

A. Yes.

Q. Approximately what was the total average daily consumption of coal by the five plants that you have enumerated?

A. It is about 6,000 tons a day.

Q. Does that figure represent approximately the consumption of those plants in 1934, 1935 and the years immediately preceding those years?

A. It may have been somewhat less, perhaps 500 tons a day less, or something like that.

Q. How often do you require deliveries at the five plants you have mentioned?

A. Daily.

Q. Was that true in 1934 and 1935;

A. It was.

Q. And the years prior to that?

A. Yes.

Q. What are the reasons for requiring daily deliveries?

A. Because we have no facilities for storing coal at the plants in the quantities that the plants use the coal.

Q. And your business requires a constant supply of coal for the generation of power for use in the city?

A. I think the——

[fol. 93] Mr. Baum: He has already testified that he needs the coal to make the steam.

Witness: I think it is generally known that the company's services are imperative for the supplying of power, and the coal is what keeps the supply going.

Mr. Lyons: I agree that is obvious.

By Mr. Lyons:

Q. Do you know whether or not Berwind-White has any facilities in New York for the storage of coal?

A. To my knowledge they have not.

Q. Do you know whether any producer or seller, large producer or seller of coal, maintains facilities for the storage of coal in New York for delivery?

Mr. Baum: That is objected to. How does he know how the coal business is run in New York.

Mr. Herman: Objection sustained.

Mr. Lyons: You might permit me to say a word.

Mr. Herman: Well, it is pretty obvious.

By Mr. Baum:

Q. Are you familiar with all of the coal dealers in New York and the method by which they operate?

A. Not all of them.

Q. Well, are you able to say what their storage facilities are and where they keep their coal, or anything?

A. I am not.

Q. You are purchasing agent for the Consolidated Edison Company and you are interested in the coal that they buy, but how can you tell how these coal people run their business?

A. I think we are talking now of bituminous coal, and the [fol. 94] large producers of bituminous coal who are the people who have the coal in the quantities we would need, and I think that we meet every one of those representatives from every one of those companies, and we hear directly from them of the supply that we need.

Q. Well then, you don't know as a matter of fact—for the reason that they told you or you inferred that?

A. Well, that is the reason I know what my name is because somebody told me.

By Mr. Lyons:

Q. Well, Mr. Savage, isn't it your business to know what these large producers of coal in New York have by way of delivery facilities?

A. We make it a point to learn that from every supplier of coal and from hundreds with whom we never do business.

Q. And you do that because that is vital to your business?

A. It is imperative.

Q. Now, I will ask you again, do you know whether any large producer and seller of coal in New York City maintains facilities for the storage of coal in New York and for the delivery of coal from such storage to plants such as yours?

Mr. Herman: Just a moment, objection has been entered previously to that question and the objection was sustained, so please do not answer that question.

Mr. Lyons: I offer to prove by the testimony of Mr. Savage that large producers and sellers of coal in New York, from which the New York Edison Company and United Electric Light & Power Company purchased their coal do not maintain facilities for storage in New York.

[fol. 95] Mr. Baum: That was objected to on the ground that the company's witnesses, their testimony which is already in evidence, could have told us that fact, if asked, but that these people are not employed by the coal company and are in no position to tell how the coal company runs its business.

Mr. Lyons: The company's witnesses have already testified to that.

Mr. Baum: Then we have it in the record from the lips of the people who know.

Mr. Lyons: We have it in the record from the lips of the people who know and I seek to get it into the record again from the lips of the person whose business it is to know, and who does know.

By Mr. Baum:

Q. Would it make any difference to you if they had storage facilities in New York?

A. It would.

By Mr. Lyons:

Q. What difference would it make?

A. If the coal producers carried a supply of coal in storage available for our use in the quantities that we would need it in the city of New York, it would not be necessary for us to maintain storage facilities.

Q. Well now, is storage coal as good in quality for the purpose of use in your plants as coal that comes directly from the mines, freshly mined coal?

A. The freshly mined coal is better. Coal in storage depreciates in value in time.

Q. Then you prefer to have coal come directly from the mines?

A. Yes.

Q. And in fact you contract for coal to come directly from the mine?

A. We do.

Mr. Baum: Well now, wouldn't the contracts say what he contracts for?

[fol. 96] Mr. Lyons: They do.

Mr. Baum: Well, all right, then the contracts would speak, he doesn't have to speak.

Mr. Lyons: When I was interrupted by Mr. Baum, I meant to complete the statement of offer of proof by saying that I further offer to prove that the reasons why the large producers and sellers of coal in New York do not maintain storage facilities here are that the necessary space, which would be very large, would not be available; that the cost of maintaining such storage facilities would be prohibitive; and that storage is unnecessary, because there are facilities, and there have been in use for a great many years, facilities for delivering coal directly from the mines, and that Berwind-White Coal Mining Company does not maintain storage facilities and has never maintained storage facilities in New York City for the same reasons.

Mr. Baum: Was this a question?

Mr. Lyons: This is an offer to prove on account of your objection.

Mr. Baum: I see.

By Mr. Lyons:

Q. Will you describe the facilities for the receipt of coal at your various plants?

A. All coal received at the plants comes in either barges or steamers to alongside our stations.

Q. Well, will you describe how—what the physical structures of the plants are for receiving coal?

A. There are towers in which there is located hoisting equipment, which operates a bucket that hoists the coal from the barges or steamers into a hopper in the tower, [fol. 97] from which it is delivered by lorries or small cars to the bunkers where the coal is needed.

Q. Now, those towers, in all cases do they face the waterfront?

A. In all cases.

Q. Then in order to receive deliveries the coal must come to the plant by water?

A. The only way we can receive coal at any of our plants is by water.

Q. Is it possible to receive deliveries of coal in your plants in the quantities you require, in any other way than by water delivery?

A. It is not.

Q. Has that always been true?

A. Yes.

Q. In connection with negotiating contracts for the purchase of coal do you familiarize yourself with the delivery facilities of the sellers?

A. We do.

Q. Are you familiar with the facilities maintained by Berwind-White for delivering coal?

A. I am.

Q. Will you describe those facilities?

A. They consist of Berwind's own railroad cars, their own barges for delivering alongside of our stations, and their own tugs.

Q. And what is the practice followed by Berwind-White in delivering coal to your plant?

A. That is the practice.

Q. Well, how——

A. The coal is delivered alongside——

Q. Well, will you describe it in more detail from the time you notify them of your requirements?

A. Well, weekly we notify the Berwind office of the amount of coal we are going to need from them the following week.

By Mr. Baum:

Q. You call up the mines?

A. We call up the office in New York.

[fol. 98] Q. I see.

A. And that coal is shipped to Harsimus Pier.

By Mr. Lyons:

Q. From the mines?

A. From the mines; where it is loaded in barges and those barges are towed alongside of our stations.

Q. Has Berwind-White Coal Mining Company maintained those facilities and followed that practice of making deliveries during all the years your companies have purchased coal from it?

A. Yes.

Q. Now, with that background of experience with respect to the quality, source and delivery of Berwind's Eureka coal, did you participate in the negotiating of contracts between Berwind-White Coal Mining Company and the New York Edison Company? And between Berwind-White and United Electric Light & Power Company, in 1934, and 1935, which are in evidence as Exhibits 12, 13, 14, 15 and 16?

Q. I wanted to ask him if he participated in the negotiation of those contracts.

A. I did. I participated in the negotiations of all of our coal contracts.

Q. Including Berwind-White's contracts?

A. Including Berwind-White's contracts.

Q. Pursuant to those contracts did Berwind-White deliver to the several plants of the New York Edison Company and the United Electric Light & Power Company the quantities of coal required by those contracts during 1934 and 1935?

A. They did.

Q. And how were those deliveries made?

A. In the manner which I have described.

Q. Pursuant to that same practice?

A. Yes.

Q. Each of these contracts, Exhibits 12 to 16 inclusive, provides under the heading "Consignment" that shipments [fol. 99] are to be consigned to your company's—and I quote this—"Shipments are to be consigned to the buyer alongside its power stations, New York City, as directed."

Will you explain the procedure followed by your companies and Berwind-White pursuant to this provision?

A. That is the procedure which I have previously described. I will repeat it if you want me to.

Q. That is the procedure which begins with your notifying the company of your requirements weekly and their delivery pursuant to the practice that you have described?

A. That is right.

Q. In entering into each of these contracts did your companies contemplate the mining by Berwind-White of Eureka coal in its mines in Pennsylvania and the delivery of such coal from such mines pursuant to the practice you have described?

A. We did.

Mr. Lyons: Do you want to cross-examine?

Mr. Baum: I would like to ask him a few questions.

Cross-examination.

By Mr. Baum:

Q. Is that coal shipped to you f.o.b. mines?

A. No, sir.

Q. Did the Berwind-White Coal Mining Company ever try to collect any money from you when they did not deliver to you because of a train wreck or something like that, en route?

A. Never.

Q. Did those cars belong to the Pennsylvania Railroad or to the Berwind-White Coal Mining Company?

A. The Berwind-White Coal Mining Company.

Q. And the barges are your barges, or Berwind-White's?

A. Berwind-White's barges.

[fol. 100] Q. Well, then, have you got anything to do with this until you get your coal at your power house?

A. Well, technically, according to the terms of the contract perhaps not.

Q. Well, now, let me ask you: Suppose that a barge sinks before she delivers the coal at your pier, do you pay for the coal?

A. Certainly not.

Q. It isn't your coal, is it?

A. No.

Q. That is your coal when it gets into the bunkers?

A. It is our coal when it gets alongside the dock.

Q. Alongside the dock?

A. Yes.

Q. Well, when the boat gets alongside the dock——

Mr. Lyons: You are asking him now who has title—whose property the coal is, aren't you?

Mr. Baum: You mean he doesn't know? He doesn't know who owns the coal?

Mr. Lyons: Well, that is a question of law, isn't it?

Mr. Baum: He knows how Berwind-White runs their business!

Mr. Lyons: I am not concerned with the question of title and I am perfectly willing to agree that the title to the coal passes when the barges come alongside the plants. So—I am not concerned with the question of title, because under the authorities, and I might quote from Justice Holmes—"Witty diversities of the law of sales have nothing to do

with the conception of interstate commerce, which is a practical conception, and is not concerned with the legal technicalities."

[fol. 101] By Mr. Baum:

Q. Do you make your payments to the office of Berwind-White in New York City?

A. Yes.

Q. And you have already told us that you put your orders in at New York City?

A. Yes.

Mr. Lyons: Excuse me. We will concede these contracts are made in New York City.

Mr. Baum: Well, now, let's summarize these concessions so we can save time:

Is it conceded, first, the contracts are made and entered into in New York City?

Mr. Lyons: Right.

Mr. Baum: That the orders calling for the weekly or daily delivery of coal are made to the office in New York City?

Mr. Lyons: Yes.

Mr. Baum: That title to the coal does not pass, or is not that of the Edison Company, until such time as the barge comes alongside the dock?

Mr. Lyons: Right.

Mr. Baum: That the delivery facilities are all furnished by the seller, both railroad cars and barges and that the buyer has nothing to do with those facilities and deliveries?

Mr. Lyons: Right.

Mr. Baum: We are agreed on that then.

Mr. Lyons: When you say the buyer had nothing to do with it——

Mr. Baum: Well, I will ask him.

Mr. Lyons: I have explained that the buyer is very much interested in those delivery facilities, so far as obtaining delivery is concerned, but he does not have any responsibility so far as seeing that the coal arrives alongside the plant.

[fol. 102] By Mr. Baum:

Q. Do you, or have you ever rejected coal because it was not delivered in the method in which it was customarily done

by Berwind-White?

A. No.

Q. You don't care what pier it comes from in New Jersey, do you?

A. No.

Q. You happen to know it is their practice to take a certain pier?

A. That is right.

Q. So far as you know they can use any railroad or any barge, whether they own it or not?

A. Yes.

Q. And you don't care?

A. We don't care.

Q. You want coal of the quality you have specified?

A. That is right.

Mr. Baum: That is all for the time being.

Mr. Lyons: I want to ask him a few questions.

By Mr. Lyons:

Q. Does the fact that the Berwind-White Company has consistently maintained the delivery facilities that you have described and has delivered coal under the practice you have described have any bearing on your negotiation of contracts for the purchase of coal from them?

A. That is the reason we continue to do business with them.

Q. Because they have maintained that delivery system?

A. Yes, because they——

Q. You do care, then, about the manner in which the delivery of the coal is made to you?

Mr. Baum: He said before he did not.

A. We do not care so long as we get the coal in accordance with the terms of our contract.

[fol. 103] Q. But in negotiating these contracts the fact that you have gotten coal over this delivery system is an important factor to you, is it not, in contracting for further purchases of coal from the Berwind-White Company?

A. That is the reason that we continue to do business with Berwind-White.

Q. All right. And you do business with Berwind-White, continue to do business with Berwind-White because they supply Eureka coal?

A. Because their deliveries are satisfactory and their coal is satisfactory.

Mr. Lyons: All right. Is that all?

By Mr. Baum:

Q. Have you been over the Pennsylvania mining regions to familiarize yourself with the different types of coal and the seams from which they are produced?

A. Some of them. I have not been over the whole region. I have been over different parts of it.

Q. This so-called Eureka coal that is furnished by Berwind-White, could that be duplicated in Pennsylvania other than in the Cambria and Somerset regions?

A. No.

Q. You are positive?

A. Yes.

Q. Did you ever have a contract under which they have furnished coal from other sources?

A. That is possible. I would have to go back over the records to tell you definitely. I believe they did.

Q. Now you told us before that you have been in this business for over twenty years, and that it is your practice to familiarize yourself with all those details?

A. Much has happened in twenty years and I don't remember it all.

Q. Now, you try to familiarize yourself with the coal business, there have been some important strikes in the coal [fol. 104] industry?

A. In 1922 I believe Berwind did supply us with coal from its southern operation at that time.

Q. You mean from its West Virginia mines?

A. From its West Virginia mines, I believe they did.

By Mr. Lyons:

Q. Was that Eureka coal?

A. Not Eureka coal.

Q. Then the coal from those mines was not the coal for which you contracted?

A. That is right, but that was an emergency and we took any coal that we could get.

By Mr. Baum:

Q. Are you familiar with all the terms of this contract?

A. I believe I am.

Q. You know that clause on Federal and State legislation, dealing with the imposition of taxes during the time that you made this contract?

Mr. Lyons: Will you read that question back?

Q. Are you familiar with this section under the heading Federal and State Legislation which refers to the payment of taxes that intervene during the time of the contract?

Mr. Lyons: Doesn't the contract speak for itself by your own objections?

Mr. Herman: Right.

Mr. Lyons: You sustain that objection?

Mr. Herman: Right.

Mr. Baum: It works both ways.

By Mr. Baum:

Q. You deal with other coal companies in New York?

A. Yes.

[fol. 105] Q. Such as the Dale Lehigh Coal Company?

A. We do no business with them.

Q. You do business with the Meenan Coal Company?

A. We do not.

Q. With Weber, Bunke-Lange Coal Company?

A. We are talking now about coal for our generating stations, not the small quantities that are purchased for domestic purposes in our various show rooms, I assume that is right.

Q. Yes.

A. We are talking only about bituminous coal burned in our generating stations. We do no business with them.

Q. This is the only company you do business with?

A. We do business with about a dozen other companies.

Q. Will you name the other companies, please?

A. Well there is——

Mr. Lyons: How is that relevant?

Mr. Baum: This man's business is to know all about the various coal companies, about this business, etc.; and he testified that he knows all about the various types of coal, let us find out that he does.

Mr. Lyons: All right, go ahead.

The Witness: What is the question?

Q. The question was, first, what are those other coal companies?

A. Well, there is J. H. Weaver & Company.

Q. Just a few.

A. Coleman Company. The Argyle Coal Company; I ought to know them all, I do.

Q. Well?

A. Johnstown Coal & Coke Company; the Pennsylvania Coal and Coke Company.

Q. And there are others?

A. There are others, yes.

[fol. 106] Q. Now, you have familiarized yourself with the coal that is furnished by these various companies?

A. Yes.

Q. Do they differ materially in quality and substance?

A. They do.

Q. Now, describe in your own words, the differences between some of these companies insofar as the quality of coal is concerned, which you must make tests for in order to—preliminary to your purchases?

A. The coal of Coleman & Company and J. H. Weaver, which comes from the Nantyglo region of Pennsylvania, which is also a B seam coal, is higher in volatile than Eureka coal; it is also higher in sulphur; it is lower in fusion; it is coal that will have as many heat units in it as the Eureka coal, but it is not, because of its high sulphur content, it will not operate as satisfactorily on stokers with high ratings.

Q. Is there no coal of any other company that is similar to the coal which you buy from the Berwind-White Company?

A. Yes.

Q. What company?

A. There is a coal known as Hughes No. 2. There is another coal known as Yellow Run produced out in Pennsylvania.

Q. Are they coals from Somerset and Cambria Counties in Pennsylvania?

A. They are.

Q. Adjoining the Berwind-White mines?

A. I don't know that they are contiguous, but they are in the same neighborhood.

Q. And their seams are substantially the same?

A. The same.

By Mr. Lyons:

Q. Do the companies that produce the coal that you have just mentioned—are they producers of coal?

A. What companies?

[fol. 107] Q. What companies produce the coal that you have just mentioned?

A. The Hughes No. 2, I believe that is G. A. Hughes Company. I don't know the name of the operator of the Yellow Run.

Q. But those companies produce that coal?

A. I know that Hughes does, because we have bought the coal from the Hughes Company.

Q. And they sell to consumers?

A. They sell to consumers.

Q. They don't sell to Berwind-White, do they?

A. I don't know.

By Mr. Baum:

Q. Well, now, in the consumption of coal that you need for the purpose of generating steam necessary to operate your plants, you buy from Berwind-White Coal Mining Company and from other coal companies? Do all your contracts run the same way, are they substantially the same?

A. I don't know what you mean by your question.

Q. Do you require that all these companies deliver the coal alongside your pier?

A. No, we do not.

Q. Is there a material variance in practice in purchases from other coal companies?

A. I believe there are two of our contractors who make deliveries alongside our stations, and the rest of them do not.

Q. The rest of them ship them from the mines, don't they?

A. Most of the coal. Most of the rest of them—in most of the rest of the cases we buy the coal f. o. b. cars at the mine; in two or three cases we buy the coal f. o. b. tidewater.

Q. It is only in the Berwind-White case that the coal comes to your pier?

A. No, we have one other contractor, a very large supplier whose coal comes alongside.

[fol. 108] Q. Who is that contractor?

A. That is Pocahontas Fuel Company.

Q. So that with Pocahontas Fuel Company and Berwind-White, the coal is brought alongside the pier, but the other companies that you contract for you will take that coal f. o. b. mines.

A. F. O. B. mines and f. o. b. tidewater.

Mr. Baum: That is all.

Mr. Lyons: That is all.

GEORGE MACDOUGALL, 177 Prospect St., Dumont, N. J., a witness called on behalf of the Taxpayer, being duly sworn, testified as follows:

Direct examination.

By Mr. Lyons:

Q. Will you give your name and address to the reporter?

A. George MacDougall; 177 Prospect Street, Dumont, New Jersey; business address 4 Irving Place, New York.

Q. Mr. MacDougall, you are now employed by Consolidated Edison Company?

A. Yes.

Q. In what capacity?

A. Assistant Comptroller.

Q. And prior to the organization of Consolidated Edison Company, you were employed by New York Edison Company and United Electric Light & Power Company?

A. Yes.

Q. In what capacity?

A. Assistant auditor.

Q. And in those capacities you have had the responsibility of checking the New York City tax assessments against those companies?

A. Yes, sir.

Q. Was a sales tax under Local Law No. 20 assessed against the New York Edison Company with respect to purchases of coal from Berwind-White Coal Mining Com- [fol. 109] pany?

A. You mean did it appear on your invoices?

Q. I mean did the City assess a sales tax against the New York Edison Company.

A. They alleged a deficiency of sales tax.

Q. For what period, against the New York Edison Company?

A. Well, the New York Edison Company, under Local Law No. 20 of 1934, from December 10, 1934, to July 1, 1935, the New York——

Q. Just a minute. With respect to purchases from Berwind-White Coal Mining Company, what was the figure on which the deficiency was based?

A. For the New York Edison Company?

Q. Yes.

A. For the same period, $667,675.97.

Q. Will you state that period again?

A. This is the period, of the New York Edison Company, under Local Law No. 20, December 10, 1934, to July 1, 1935, $667,675.97.

Q. I believe you said before it was December 1, 1935. I wanted to correct that.

A. No, I said July.

Q. Do you know the amount of the tax that was assessed on that figure?

A. Well, the amount of the tax would be 2 per cent of that amount, I haven't got it.

Q. And were penalties assessed also?

A. Penalties were assessed too.

Q. Was there a sales tax assessed against the United Electric Light & Power Company on purchases of coal from the Berwind-White Coal Mining Company?

A. Yes.

Q. For what period?

A. Under Local Law No. 20 from December 10, 1934, to May 31, 1935.

Q. And what was the amount on which that assessment—the amount of sales on which that assessment was based?

A. $371,669.22.

Q. And the tax was 2 per cent?

A. Two per cent.

[fol. 110] Q. And penalties?

A. Plus penalties, or interest—it may have been interest.

Q. Was a sales tax assessed against New York Edison Company, Incorporated on account of sales of coal by Berwind-White to United Electric Light & Power Company and New York Edison Company?

A. I didn't quite get your question.

Q. Was a sales tax assessed against New York Edison Company—no, wait a minute—the New York Edison Company, Inc., that is the one.

A. Oh, yes.

Q. On account of sales of coal to it by Berwind-White Coal Mining Company?

A. That is under Local Law 25, from August 1, 1935——

Q. Wait a minute. I asked you whether a sales tax was assessed against that company under Local Law No. 20?

A. No.

Q. None?

A. None.

Q. Was a personal property tax—before I ask that question, were any of these sales taxes that you testified to paid by those companies?

A. No.

Q. Was a personal property tax assessed against the United Electric Light & Power Company covering coal that had been purchased from Berwind-White Coal Mining Company?

A. Yes.

Q. For what period?

A. Under Local Law No. 25, from March 1, 1935, to July 31, 1935.

Q. And what was the amount on which the assessment was based?

A. $115,306.18.

Q. And was a similar personal property tax assessed against New York Edison Company, Inc. with respect to coal purchased from the Berwind-White Coal Mining Company?

A. Yes.

Q. For what period?

A. August 1, 1935, to December 31, 1935.

Mr. Baum: Can't we cut this short?

[fol. 111] By Mr. Baum:

Q. Have you paid any of these taxes?

Mr. Lyons: Now, wait a minute, he is bringing this out, Mr. Baum. I am just getting to the end of this, if you don't mind.

By Mr. Lyons:

Q. What was the amount of purchases on which that tax was assessed?

A. $925,547.97.

Q. And the taxes there were at the same rate, at 2 per cent, plus penalties?

A. Two per cent plus penalties.

Q. Now, did you pay—were those property taxes paid by the United Electric Light & Power Company and New York Edison Company, Inc.?

A. These amounts were deposited with the City against these taxes.

Q. That includes taxes and penalties, the amount that was deposited?

A. Taxes and penalties.

By Mr. Baum:

Q. You have paid that, do you say?

A. No, they were deposited with the City.

Q. What do you mean deposited?

A. Placed, with the City, placed with the City, deposited with the City against these taxes, as per your request, and Mr. Solomon's letter.

Mr. Lyons: All right, that is all, Mr. MacDougall.

By Mr. Herman:

Q. You say you deposited these personal property taxes with the City. That was in reference to the hearing—you [fol. 112] were required to deposit that money before you were allowed a hearing, is that correct?

A. That is my understanding.

Q. And the only reason you deposited those moneys was to obtain such a hearing?

A. And to avoid any further penalties.

By Mr. Baum:

Q. The point is, there has been no final determination of tax against the company?

A. No.

Q. There is going to be a hearing, the matter will be considered, and that applies to all the socalled assessments that you have been talking about?

A. Yes.

Mr. Lyons: The City has the money though.

LELAND B. BONNETT, 32 Crescent Terrace, Brooklyn, a witness called on behalf of the Taxpayer, being duly sworn, testified as follows:

Direct examination.

By Mr. Lyons:

Q. Will you state your name and address for the record?

A. Leland B. Bonnett; and the business address is 380 Pearl Street, Brooklyn; home address 32 Crescent Terrace, Brooklyn.

Q. Mr. Bonnett, what is your position with the Brooklyn Edison Company?

A. I am the purchasing agent.

Q. And what are your duties in that capacity with respect to the purchase of coal?

A. The negotiation of contracts and seeing that we get the receipt of the coal.

Q. How long have you been associated with the Brooklyn Edison Company?

A. Fourteen years.

[fol. 113] Q. During that period you have had to do with the purchase of coal?

A. In the last, say eleven years.

Q. What is the business of the company?

A. The business is the generation of electricity and the distribution and sale of it.

Q. The coal is used for the production of steam in connection with the generation of electricity?

A. That is right.

Q. Does your company make tests or other experiments to determine which particular kinds of coal are best adapted for use in your plants?

A. We have. We find that certain coals will function and certain coals will not.

Q. Has Berwind's Eureka coal been tested in that connection?

A. It has.

Q. And what did those tests reveal with respect to the quality of Berwind's Eureka coal and with relation to your requirements?

A. It revealed excellent quality entirely satisfactory for use in any of our plants.

Q. How long has your company been buying Eureka coal from Berwind-White?

A. Since 1921.

Q. In approximately what quantities?

A. Well, for many years back, approximately 300,000 to 400,000 tons a year.

Q. During that period you have consistently purchased Eureka coal from Berwind-White?

A. Yes.

Q. What is the source of the Eureka coal, do you know?

A. Eureka coal comes from the State of Pennsylvania, B seam, in the counties of Cambria and Somerset.

Q. Is that the only source of Eureka coal?

A. That is the only source of Eureka coal.

Q. Does the quality of the coal have any particular relation to its source?

[fol. 114] A. Yes, coal from different sources has different qualities, different characteristics.

Mr. Baum: May I interrupt?

By Mr. Baum:

Q. Mr. Bonnett, you heard Mr. Savage's testimony?

A. Yes.

Q. You would testify to substantially the same, wouldn't you?

A. Yes. I found nothing to disagree with what he said.

Mr. Baum: Can't we let it go that way?

Mr. Lyons: I am satisfied, if you will stipulate.

Mr. Baum: That is what he said; he will testify substantially as Mr. Savage has, being purchasing agent for another utility company, which is part of the Consolidated Edison system, isn't it?

The Witness: That is right.

By Mr. Lyons:

Q. You would testify substantially to the same things that Mr. Savage testified to with respect to the quality of Eureka coal, the source of the coal, the delivery facilities of the Berwind-White Coal Mining Company, the practice carried on in purchasing it—carried on by Brooklyn Edison Company and Berwind-White Coal Mining Company in negotiating contr -ts for the purchase of coal between those

companies, and in making deliveries of coal under those contracts?

A. Yes.

Mr. Lyons: Well, I don't know, maybe we better run through these questions.

[fol. 115] Mr. Baum: All right, you are entitled to if you want; you can't add anything more than Mr. Savage. Mr. Savage has been in the business, I think, with all due deference to you, even a little bit longer than you.

Mr. Lyons: That is true, but I want to get this in with respect to each purchaser.

By Mr. Lyons:

Q. Will you testify, Mr. Bonnett, that in the light of the practise with respect to quality, source, and delivery of Eureka coal that you contracted for Eureka coal from the mines in Somerset and Cambria Counties, and for the delivery of such coal over the delivery facilities maintained by Berwind-White, in these contracts made in 1934 and 1935?

A. I do, yes.

Q. That the coal delivered pursuant to those contracts was delivered from the mines over the delivery facilities maintained by Berwind-White?

A. Yes.

Mr. Lyons: All right.

Mr. Baum: No questions, Mr. Bonnett.

Mr. Lyons: Just a minute, I want to ask Mr. Bonnett some more questions.

By Mr. Lyons:

Q. Mr. Bonnett, was the sales tax assessed against the Brooklyn Edison Company on purchases of coal from Berwind-White Coal Mining Company?

A. It was, yes.

Q. For what period?

A. December 10, 1934, to May 31, 1935.

Q. And what was the amount on which those taxes were assessed—the amount of purchases?

A. The amount on which the tax was assessed was $457,090.93.

[fol. 116] Q. And the tax was at the rate of 2 percent, plus penalties?

A. Correct.

Q. Was that paid?

A. That was not paid.

Q. Was the personal property tax assessed against the Brooklyn Edison Company on purchases of coal under Local Law No. 25?

A. Yes.

Q. For what period?

A. From May 1, 1935, to December 31, 1935.

Q. And on what amount?

A. $1,462,638.65.

Q. And that was at the rate of 2 percent?

A. Two percent, yes.

Q. Plus penalties?

A. Plus penalties.

Q. Was that tax paid?

A. Deposit was made with the Comptroller, which includes this amount, yes.

Mr. Lyons: All right.

By Mr. Baum:

Q. You have not conceded your liability under any of those taxes, have you?

A. I have nothing to do with that.

Q. But as a matter of fact you are contesting that; but you know from your own information that that is being contested now?

A. Yes.

Mr. Lyons: All right, I want to ask another question, Mr. Bonnett.

By Mr. Lyons:

Q. When you contract for coal from Berwind-White, you contract for fresh mined coal?

A. We do.

Q. But you have to keep storage facilities, because no producer and seller maintain storage to fill your requirements, isn't that true?

A. Will you state that again?

Mr. Baum: Will you state that again?

[fol. 117] Q. Do you have to keep any storage facilities?

A. We have small storage facilities, yes.

Q. What is the reason for that?

A. To take care of any emergencies that might arise when the regular movement of coal might be interrupted.

Q. Well, does any producer or seller of coal maintain storage in New York?

A. Not to my knowledge.

Mr. Lyons (to Mr. Baum): We will have to recall Mr. Savage unless you concede that.

Mr. Baum: I thought that was covered. Just one question.

By Mr. Baum:

Q. You were asked whether any producer of coal maintains facilities?

A. That is correct.

Q. Now, I am going to ask you whether any seller of coal maintains facilities?

A. Not enough for our purposes.

Q. Well, how do you know?

A. Because anyone who has such facilities would be sure to tell us about them.

Q. That is all you have to base it on?

A. Yes.

Mr. Baum: That is all.

Porter C. Savage, a witness on behalf of the Taxpayer, being duly recalled, testified as follows:

Redirect examination.

By Mr. Lyons:

Q. Mr. Savage, do you know whether any producer or seller of coal in the quantities that you require maintains storage facilities in New York?

A. I don't know of any such facilities.

[fol. 118] Q. Do you know why such facilities are not maintained?

Mr. Baum: Well now, how is he competent to say why they are not maintained? Does he know why coal companies do or don't do things?

Mr. Lyons: That is his business.

Mr. Baum: No, he is in the business of purchasing coal, he is not in the business of operating mines.

Mr. Lyons: Well, let us ask him if he knows.

Mr. Baum: Well, that is objected to because he is not competent to answer that, do you know why?

Mr. Lyons: Well, if he knows——

Mr. Baum: It is purely an opinion on his part to state if he knows why they don't keep it, if they don't.

By Mr. Lyons:

Q. Well, does coal deteriorate when it is kept in storage?

A. Slowly, yes.

Mr. Baum: He testified to that.

Q. Would not the storage facilities necessary to supply plants such as yours require a tremendous amount of space and investment?

A. Yes.

Q. And the coal delivered, if any such storage were maintained, the coal would have to be delivered to your plants by barge, wouldn't it?

A. It would.

Q. Do you know of any coal mines in the state of New York?

A. I know of none.

[fol. 119] Q. And the coal kept in such storage would have to be brought in from outside the state?

A. That is right.

Mr. Baum: You know that many sellers of coal have coal stored here, don't you?

The Witness: I know that there is coal stored in the city of New York, but not in the quantities to take care of our requirements.

George W. Jones, 45 Gramercy Park, New York City, business address 385 Flatbush Avenue Extension, Brooklyn, a witness called on behalf of the Taxpayer, being duly sworn, testified as follows:

Direct examination.

By Mr. Lyons:

Q. Will you state your name and address for the record?

A. George W. Jones, 45 Gramercy Park; business address, 385 Flatbush Avenue Extension, Brooklyn.

Q. What is your position with the Williamsburgh Power Plant Corporation?

A. Vice-President.

Q. How long have you been associated with the company?

A. With the Williamsburg since January 1, 1930.

Q. Do you have charge of negotiating and making contracts for the purchase of coal?

A. I have.

Q. What is the business of the Williamsburgh Power Plant Corporation?

A. It generates electricity to run the B. M. T. System.

Q. What use is made of coal by the company?

A. It generates steam which, in turn, turns the turbines.

[fol. 120] Q. How many power plants does the company have?

A. We only have one that uses Berwind-White coal.

Q. Where is that plant located?

A. On the East River, in the Borough of Brooklyn.

Q. Are you familiar with Berwind's Eureka coal?

A. Yes.

Q. How long has your company been purchasing Berwind's Eureka coal from the Berwind-White Coal Mining Company?

A. To my personal knowledge, 17 years, but I understand longer than that.

Q. What has been the experience of your company with respect to the quality of that coal, so far as its adaptability for use in your plants is concerned?

A. It has always proved entirely satisfactory.

Q. Have you ever bought Berwind's Eureka coal from any other company than Berwind-White?

A. No.

Q. Do you know the source of Berwind's Eureka coal?

A. Yes.

Q. What is it?

A. Cambria and Somerset Counties, Pennsylvania.

Q. Does it come from particular mines?

A. Yes, our contract specifies particular mines.

Q. Well, does the quality of the coal have any relation to the mine from which it comes?

A. That is my understanding.

Q. Is that why you contract for particular mines?

A. Yes.

By Mr. Baum:

Q. Mr. Jones, you have heard Mr. Savage and Mr. Bonnett. Would you add anything further to what they have said, or would you testify substantially the same as they did?

[fol. 121] A. As to the quality of coal, delivery system and so on and so forth, I would testify the same as Mr. Savage testified.

By Mr. Lyons:

Q. You would testify that you contract for Eureka coal to be produced at the mines of the company in Somerset and Cambria Counties and shipped from those mines to your plants?

A. Yes.

Q. And that you require constant deliveries?

A. Right.

Q. And that you contract for delivery over the delivery system of the Berwind-White Company?

A. Yes.

Q. And that the contracts in 1934 and 1935 were made under those circumstances?

A. Yes.

Q. And that the contracts in all prior and subsequent years were similarly made?

A. During the period that I negotiated the contracts.

Q. And that those contracts contemplated direct delivery from the mine to your plant?

A. Yes.

Mr. Lyons: All right, Mr. Jones. I want to ask you about the taxes.

Q. Will you state what taxes have been assessed against the Williamsburgh Power Plant Corporation with respect to its purchases of coal from Berwind-White Coal Mining Company, the period and the amount on which the tax was based, and the tax and penalties?

A. For the period December 10, 1934, to February 28, 1935, on sales amounting to $152,534.59, the tax on that amount was $3,050.69. The interest——

Q. Was that a sales tax under Local Law No. 20?

A. Sales tax under Local Law No. 20. The interest and penalties amount to $427.10, making a total for that particular period of $3477.79.

[fol. 122] For the period from March 1, 1935 to May 31, 1935, assessed on $158,408.66, the tax being $3168.17, interest and penalties $348.50, or a total of $3516.67.

And from June 1, 1935, to August 31, 1935, assessed on $199,021.79, the tax being $3980.44, interest and penalties $358.24, making a total of $4338.68.

Q. Now, did you give the grand total?

A. The grand total being $10,179.30 as the tax.

Q. As the tax?

A. Yes, as the tax. And $1153.84 penalties or interest; making the total $11,333.14.

Q. And that covers the period from December 10, 1934, to August 31, 1935?

A. Right.

Q. Did your company pay those taxes and penalties?

A. Yes, sir.

Q. To the City of New York?

A. Yes, to the City of New York, the Comptroller.

By Mr. Baum:

Q. But you are now contesting that in the courts, are you not?

Mr. Lyons: No, that is the sales tax. That is the sales tax, that is not the property tax.

By Mr. Baum:

Q. Is that the sales tax?

A. The sales tax.

Q. You paid that voluntarily?

A. We paid it under protest.

Q. Are you contesting that now?

A. We have had a hearing before this Board, something over a year ago.

Q. Has there been any final determination?

A. No, sir.

[fol. 123] Q. In other words, that has not been finally determined or adjudicated in any way?

A. No, sir.

Mr. Lyons: But the tax has been paid. The tax has been paid.

By Mr. Baum:

Q. Under protest?

A. Yes.

By Mr. Herman:

Q. You stated that you have other power plants located in the City of New York wherein you use other than Berwind-White coal?

A. We have one small standby plant.

Q. I see; and you use coal other than Berwind-White coal in that plant?

A. We use both bituminous and anthracite coal.

Q. Is the type of work which you do in this power plant similar to the type of work which you do in the power plant wherein you use Berwind-White coal?

A. No.

Q. How is that different?

A. Well, it is similar in this way, that we generate the power; but the standby plant ordinarily does not run except during the rush hour, only at the peak loads, we put that plant in just to bolster up the current in the lower end of Brooklyn. Some times it may not operate for 10 or 12 hours.

Q. What type of coal do you use in this standby plant, do you call it?

A. We use both bituminous and anthracite coal.

Q. Could that type of coal be used in the plant which is—in the plant wherein you use coal made by Berwind-White, mined by Berwind-White?

A. No.

[fol. 124] Q. Why is that so?

A. At our main plant we have a continuous load and the stokers are quite different from the old standby plant.

Mr. Lyons: I want to call Mr. Starboard, anyway.

Mr. Baum: All right.

By Mr. Herman:

Q. Is it possible to use any other type of coal other than the Berwind-White coal at this Williamsburgh Power plant?

A. Well, we do use it—ordinarily we have four, once in a great while five suppliers. But the coal all comes from the region from which the Berwind-White coal is mined.

Q. In other words, you are interested in coal which can be used advantageously in your Williamsburgh power plant?

A. Right.

Q. And it is not necessary that it has to be Eureka coal, as long as the coal satisfies the requirements of your particular power plant?

A. Well, of course, one of the main things that we would look to is the reliability of the delivery of the coal.

Mr. Lyons: Mr. Herman, I might point out that these contracts with Williamsburgh specifically provide for the delivery of Eureka coal from particular mines, so that that is what the contract calls for and——

Mr. Baum: Just a question or two, Mr. Jones.

By Mr. Baum:

Q. You stated that in addition to the Berwind-White Coal Mining Company there are three or four other coal companies that supply the needs of the Williamsburgh power plant?

A. Yes, right.

[fol. 125] Q. Is that coal substantially the same as the Berwind-White coal?

A. I will say this, that we use the Berwind Eureka coal as our standard, 100 percent. And we base our purchases of other coal upon the price of the Berwind coal—in other words, that is our yardstick.

Q. Price or quality?

A. Both.

Q. Well, now, referring specifically to quality, is this other coal that is purchased from the other companies substantially the same as the Berwind coal?

A. We have one coal that on using our yardstick, where Berwind was shown 100 percent and the next coal was shown at 99 percent.

Q. The next is the Hughes Company?

A. No, sir.

Q. You don't know the name of that company?

A. No, we don't buy from Hughes.

Q. I say, what is the other company?

A. Madeira Hill—Cortright Coal Company; and during the period we are talking about now, we bought from the Consolidation Coal Company.

Q. Do your contracts with these other companies run substantially the same as the Berwind-White contract, or do they differ substantially?

A. Every one of our contracts differs.

Q. You take some of the coal F. O. B. mines from these other companies?

A. Outside of Berwind we buy all of our coal F. O. B. the coal piers in Jersey City.

Mr. Baum: That is all. Now, we will agree next time on those other witnesses.

Mr. Lyons: Yes, I want to ask Mr. Starboard a few questions, and we can then enter into a general stipulation on the rest of them.

[fol. 126] Mr. Herman: Hearing adjourned to May 21, 1937, at 10:00 A. M.

Mr. Herman: This is a continuation of a hearing last held on May 6, 1937.

Mr. Lyons: It is agreed between counsel that, if the purchasing agents for the customers named below were called to testify, they would testify to substantially the same facts with respect to the course of dealing in the purchase of coal from Berwind-White Coal Mining Company, as appears in the testimony of Mr. Savage. They would also testify that the contracts for the purchase of coal which their companies made with Berwind-White in 1934 and 1935, were made in the light of that course of dealing. They would also testify that they received deliveries of the coal pursuant to those contracts, in accordance with the course of dealing referred to.

(Stipulation continued by Mr. Baum.)

Mr. Baum: In fact, they would testify substantially as did Mr. Savage, the purchasing agent for the Consolidated Edison Company, as well as Mr. Jones, of the Williamsburgh Power Plant Corporation, who were called here as witnesses, testified; also Mr. Bonnett, of the Brooklyn Edison.

Mr. Lyons: I think that is satisfactory. I will give you a list of customers, as follows:

All America Cables.
Arbuckle Brothers.
Caddell Drydock & Repair Co.
Clyde-Mallory Lines.

[fol. 127] Compagnie Generale Transatlantique (French Line).

Compania Transatlantica (Spanish Line).
L. A. Dreyfus Company.
Interborough Rapid Transit.
International Mercantile Marine Co.
N. Y. & Porto Rico Steamship Co.
North Atlantic & Gulf Steamship Co.
Ocean Dominion Steamship Co.
Pioneer Terminal Corp.
U. S. Navigation Co.

Mr. Lyons (continuing): The Receiver of Interborough Rapid Transit Co. has been assessed a sales tax by the City of New York, under Local Law No. 20, upon purchases of coal from Berwind-White Coal Mining Company, made during the period beginning December 10, 1934, and ending December 31, 1935, in the amount of $45,760.94, including interest and penalties in the amount of $6,110.66, upon purchases in the amount of $1,982,514.22.

Clyde-Mallory Lines, Compania Transatlantica (Spanish Line), and Arbuckle Brothers have each been assessed a sales tax by the City of New York under Local Law No. 20 upon, in each case, a part or all of the purchases of coal from Berwind-White Coal Mining Company, made during the same period. None of these taxes has been paid, and the companies are contesting the validity of the imposition of these taxes by the City of New York.

Mr. Herman: No objection.

[fol. 128] FREDERICK D. SEYMOUR, a witness for the Taxpayer, having been previously sworn, testified as follows:

Cross-examination.

By Mr. Baum:

Q. Describe for us the New York office, both as to size, the number of men employed, the number of salesmen, the number of executives, located in the New York office?

Mr. Lyons: I am not sure that I see how that is material. We have conceded that the contracts were made in New York. How else could it be material?

Mr. Baum: It could be material in at least three different ways: The nature of what constitutes doing business in

New York will depend to a great extent upon the location of the activities in New York City. It is one thing to have three or four itinerant salesmen in New York and the main, home office, located outside the State. That is very common in the mail-order cases. It is another thing to have a very large permanent set-up here with materials and samples and other display. It is even still more important to find out whether the executives of the company stay here in New York and transact the business from New York. You have characterized this taxpayer as a producer. We want to characterize him, if possible, as a salesman-producer combination, which will bear materially upon the factual set-up in which a court decides what the situs of the transactions are.

Mr. Lyons: Well, just one principal comment: We are [fol. 129] not dealing here with the question of what constitutes doing business.

Mr. Baum: No. That is true.

Mr. Lyons: This is a sales tax and not a tax on transacting business.

Mr. Baum: That is right.

Mr. Lyons: Consequently, I don't see what bearing the activities of the company in New York have, so far as they deal with doing business.

Mr. Baum: I do not want to continue the harangue with you too much, but I will specifically state that the question of what constitutes an interstate commerce transaction is not so much as to whether the transaction is one that involves a shipment in interstate commerce, but is one in which a burden on interstate commerce is disclosed. This burden can only be arrived at by considering all of the factors that enter into the method of doing business on the part of this company. The question of the burden is the question of the evaluation of all these factors. Under those circumstances, the entire method of doing business is material in disclosing whether a burden on the commerce is here shown.

Mr. Lyons: I see your point of view, but I still object to the question.

Mr. Baum: And in considering that question, I have definitely in mind the case of McNeil Marble Company.

Mr. Lyons: Which, I think, is wholly immaterial.

Mr. Baum: But nevertheless it sets forth the requirements for a tribunal to disclose the method of doing busi-

ness by the taxpayer, preparatory to arriving at any con-
[fol. 130] clusion as to whether or not this is a burden on interstate commerce. I have no desire to go into irrelevant matters, but we might as well have the picture, as to what the company is doing in New York, as one of the factors in determining whether or not there should be liability in this case.

Mr. Lyons: I object to the line of inquiry on the ground that it is immaterial and irrelevant.

Mr. Herman: Objection overruled.

Mr. Lyons: Exception.

By Mr. Baum:

Q. You have my question?

A. The size of the office is approximately one floor of No. 1 Broadway. I do not know that I can give it to you in square feet, but I would take a guess that it is 150 feet long by approximately 50 or 60 feet wide, divided up into offices for the president, two vice-presidents, general sales manager, manager for the foreign and bunkering department, New York district sales manager; that covers a part of New England, and New York State, and New Jersey, and also covers other territories at our discretion; a research department, a small accounting department, not the entire accounting department for the company, principally on foreign work. And clerks for those various branches of work.

Q. About how many employees altogether?

A. I would say offhand about 25.

Q. Do I understand the president of the company, Mr. Dunlap, has his office here?

A. That is correct.

Q. You also said two vice-presidents of the company have their offices here?

A. That is right. Do you want to ask questions with
[fol. 131] reference to the vice-presidents—I don't know what you want to know. Two vice-presidents are in New York, yes.

Q. Are there any officers of the company located in Pennsylvania?

A. Yes, sir.

Q. Who are there?

A. The vice-president in charge of operations, and the treasurer, and the secretary.

Q. And the president and two vice-presidents are located here in New York?

A. That is correct.

Mr. Herman: How long has the company maintained its business in New York City?

The Witness: I can only answer that to my knowledge, since 1930, when I came with the company. And I would assume for a period of forty of fifty years, with some slight change in location during alterations.

Mr. Lyons: Could I interpose a question?

Mr. Baum: Yes.

By Mr. Lyons:

Q. What part of the business is supervised from the Pennsylvania office?

A. Principally the operations. There is also a sales office there.

Q. You mean the mining operations?

A. That is correct. Supervision of the mining operations is in Philadelphia.

Q. And also supervision of shipments of coal?

A. Shipments and accounting, billing and all.

Q. The main books of the company are kept in Philadelphia?

A. The main books of the company are in Philadelphia.

Q. What part of the business is supervised in New York?

A. Primarily the sales and financing end of the business. And, I might add, foreign transactions.

Q. Foreign sales?

A. Foreign sales.

[fol. 132] By Mr. Baum:

Q. One other matter we want cleared up. Where is payment made under these contracts?

A. I don't understand the question. Do you mean, where do we make payment?

Q. How is payment received?

A. Payment is received, in the case of the utilities, in New York, and transferred to Pennsylvania after notation is made.

Q. You say, in case of the utilities; what about the case of the steamship companies?

A. I believe that most of that comes into New York.

Q. Isn't it a fact that all the payment is made to the New York office in the first instance?

A. I don't know that I can answer that directly, but some payment is made directly to Philadelphia, and Philadelphia bills for the coal, on a Philadelphia bill-head, for some of the coal sold in New York.

Q. Do I understand that, let us take for example one of your large purchasers, namely, Consolidated Edison. How is Consolidated Edison Company billed?

A. By Berwind-White Coal Mining Company, during the period of 1934-1935 we are discussing, from New York.

Q. From New York. How does Consolidated Edison make payment? By check, I take it.

A. By check to our New York office.

Mr. Lyons: You say that is transmitted to Philadelphia?

The Witness: That is transmitted to Philadelphia.

Mr. Lyons: You mean, the checks?

The Witness: That is correct. No deposit is made in New York.

Mr. Lyons: The checks are deposited in a Philadelphia bank?

[fol. 133] The Witness: The checks are deposited in Philadelphia.

By Mr. Baum:

Q. I think we covered this point, but I wish to ask it of you. All of the contracts are signed, sealed and accepted by a duly authorized officer of the company in the New York office?

A. Not during the period 1934-1935. Contracts were also signed in Philadelphia by the vice-president there.

Q. Was that a new practice?

A. That was an old, established practice which has recently been changed.

Q. Contracts with the transportation and utility companies of New York City?

A. No, sir.

Q. Then, which contracts do you mean?

A. Philadelphia contracts.

Q. I am directing our attention to the transportation and public utility and steamship companies that are here involved in the assessment of the Comptroller. As to those companies is this a correct statement of the facts: That the

contracts are signed, sealed and accepted by a duly authorized officer of the company in the New York office?

A. That is correct.

Q. That might be Mr. Dunlap, and it might be one of the vice-presidents, and it might be the sales manager in charge?

A. That is correct. However, I might add that there may be a case where a vice-president, in the absence of somebody else, in Philadelphia, might sign a contract. I would not say there was a case of that kind, but it is possible.

Q. That, of course, is not the general practice?

A. That is not the general practice.

Q. There has been testimony given that the purchasers here in question sampled the coal as to quality. Will you describe the mechanics by which the sampling operation is [fol. 134] carried out? What coal? Where does the coal start, and how do you sample it in conjunction with the officials of these various companies here in question?

A. Sampling is an art in itself. We sample coal at the pier, by taking a shovel-full now and then from the coal as it is loaded into the boat, by hand. That sample is collected in 100 pounds or more piles. Then it is quartered and re-assembled and re-quartered and re-assembled a number of times until an actually representative sample of that original 100 pounds is obtained. That sample is then crushed to a small granular size, and sent to a chemist for chemical analysis. The same thing is done with the utilities themselves, except in a great many cases it is done automatically; perhaps, in chuting the coal to the bunkers, a flap may drop out every now and then, to get a representative sample of the coal as it flows—if you follow me,—it is then assembled into quantity and the same procedure gone through. Before contracting or continuing under a new contract, these large purchasers of coal want the coal sampled, or want to be assured that they are going to get coal in conformity with an agreed upon sample.

Q. Do you bring some of that coal to their plant in New York City, or do they join you at Harsimus Pier for an examination of the coal? How do they get their first contact with the sampling process?

A. In general practice—let me put it that way—the customer buys a quantity of coal, let us say a carload or a cargo or barge load, as a sample, and takes his own sample from that and has it analyzed.

Q. Is that cargo of coal part of a shipment in the process of being made, or is it just a sample, gift, on your part?

A. No. It is a purchase, I would say, always.

[fol. 135] Q. In other words, he makes a small purchase to start?

A. He may make a small or large purchase.

Q. And he does his own sampling of the coal?

A. He does his own sampling of the coal in the way he makes it, because there are a variety of ways of making samples, and you can produce almost any desired result.

Q. Is it the practice for any of these purchasers here in question to go to Pennsylvania in the mines and sample the coal there?

A. No. I would say that what inspection of the mines there has been, is to inspect the coal and to see our method of sampling there, and compare that with their own.

Q. But they do their own sampling here in the city?

A. Ordinarily.

Q. You say ordinarily. What do you mean?

A. I mean they may send an inspector down there and sample a car of coal or a particular consignment of coal, yes, but that is not the ordinary practice.

Q. The practice is to sample it themselves here in New York City?

A. That is correct.

Q. Directing our attention to this Eureka coal which comes from the "B" seam run of the mine, Eureka coal is the trade name, is it not?

A. That is right.

Q. It represents a certain quality of coal. Is that right?

A. Yes.

Q. I take it that you are sufficiently familiar with the Pennsylvania mining region to tell us the area in which that quality of B seam coal can be gotten or mined. Could you tell us where in Pennsylvania, so far as you know?

A. That quality of coal can be obtained in the counties of Somerset and Cambria, Pennsylvania; not all of the counties.

Q. What do you mean, not all of the counties?

A. That seam, while it runs through the counties, may [fol. 136] vary as it goes north. It gets higher in volatile and other qualities will change. The same seam of coal will change as it goes in a certain direction.

Mr. Lyons: When you said, not in all of the counties, you mean not in all parts of those two counties?

The Witness: That is correct. I would say that quality of coal is confined to an area probably of 100 or 150 square miles.

By Mr. Baum:

Q. You say, so far as you know, in no other part of Pennsylvania or anywhere else is there coal of this quality and calibre?

A. To the best of my knowledge, that is true, speaking from a chemical standpoint.

Q. Does the Berwind-White Company have all of the properties in Pennsylvania that encompass this area of the so-called B seam coal?

A. No.

Q. There are quite a number of other coal mining companies that have control of seams substantially the same as the B seam?

A. There are other companies who control portions of the same seam.

Q. You are familiar with those companies?

A. Some of them.

Q. They are your competitors, as a matter of fact?

A. That's correct.

Q. Do they call their coal Eureka coal?

A. No, sir.

Q. What do they call the B seam coal?

A. They generally call it B seam coal. In some cases they may call it Navy standard coal, or they may have their own trade name for it.

Q. In other words, there are a lot of trade names for that quality of coal?

A. That is correct.

[fol. 137] Q. And you use one of them.

A. That is correct.

Q. You heard the testimony of Mr. Savage to the effect that he dealt with other coal companies besides Berwind-White?

A. I did not hear his testimony, but I have read it.

Q. And he stated that he got the same seam of coal from these other companies?

A. Correct.

Q. Have you ever had occasion, or do you know of any occasion in which you have had to go to these other companies to get some of your B seam coal, for various reasons, whether strike or otherwise, in order for you to fill your orders?

A. Never, to my knowledge.

By Mr. Lyons:

Q. Is the Berwind-White Company the largest producer of that particular grade of coal?

A. To my knowledge, it is by far the largest company.

By Mr. Baum:

Q. Berwind-White also has mines in West Virginia. That has been testified to by Mr. Dunlap?

A. No, that is not correct. Berwind-White Coal Mining Company does not own mines in West Virginia.

Q. What do they own in West Virginia?

Mr. Lyons: I believe Mr. Dunlap testified that they do not own mines in West Virginia; that they act as sales agent for other companies who own mines in West Virginia.

By Mr. Baum:

Q. Those companies do not put out this B seam quality of coal, do they?

A. There is no B seam coal in West Virginia.

[fol. 138] Q. What kind of coal is there in West Virginia?

A. There are various and sundry kinds of coal in West Virginia; from high volatile to low volatile coal.

Q. Could you, or did you ever make delivery of coal in New York City pursuant to these contracts, from the West Virginia mines?

A. Not during the term which we are discussing.

Q. During any term?

A. Yes.

Mr. Lyons: Just a minute. That question——

Mr. Baum: You can clear it up.

Mr. Lyons: Was the coal delivered coal that was called for by the contract?

The Witness: It was not represented as B seam coal. It was under an emergency condition, and only under emergency conditions, and so represented as West Virginia coal.

By Mr. Baum:

Q. I think we have it in the record, but I will again ask you in order to be doubly sure. Delivery under these contracts with the utility, transportation and steamship companies is required to be made to points in New York City, is it not?

A. It is.

Q. Except for the Austin Nichols case and the Arbuckle Brothers case, which I think you cited to us once before?

Mr. Lyons: No. It is Austin Nichols and New England Steamship.

By Mr. Baum:

Q. These contracts call for delivery in New York City alongside dock?

A. New York City.

[fol. 139] Q. Do you know how this name Eureka evolved and how long it has been in use and in vogue?

A. I don't know how it was evolved. I would say it has been in use for forty or fifty years. I don't know that from my own knowledge, but from hearsay.

Q. Is there a trade name for the so-called C seam coal?

A. We generally refer to it as Berwind's Standard C prime coal, if that may be called a trade name.

Q. There is no name that is comparable to Eureka on it?

A. No, there is not.

Mr. Lyons: Do you happen, Mr. Seymour, to know whether the Berwind-White Company was the first company in the field on B seam?

The Witness: I don't know that.

Mr. Lyons: I guess that closes the case.

By Mr. Herman:

Q. What are the methods of advertising your coal?

A. We advertise in the coal journals. All other advertising by Berwind-White Coal Mining Company is done by the salesmen.

Q. Do you send out circulars to your various customers?

A. No, sir.

Mr. Lyons: Isn't your coal your best advertisement?

The Witness: Our coal is our best advertisement.

By Mr. Baum:

Q. Do you own the railroad cars between the mines and Harsimus Pier that run between those points?

A. We do.

[fol. 140] Q. Do you pay rental to the Pennsylvania Railroad for the use of the trackage?

A. I don't know.

Q. Do you know the arrangement with the Pennsylvania?

A. I do not know the arrangement with the Pennsylvania.

Q. You own those cars?

A. That is correct.

Q. And the coal is loaded in your cars?

A. That is right.

Q. Then when the coal arrives at the pier it is loaded onto your barges?

A. That is correct.

Q. Do you own those barges?

A. We own the majority of them. Some of the barges are chartered at times.

Q. In other words, the vehicle of transportation from the mine to the plant of the customer is your vehicle?

A. In general practice, aside from what barges we may charter to supplement our own.

Mr. Herman: Case is closed. Decision reserved.

[fol. 141] **Taxpayer's Exhibits Referred to in Document 3, Annexed to Return**

EXHIBIT 1

This exhibit is omitted. It is a power of attorney. See stipulation at page 195 hereof.

EXHIBIT 2

This exhibit is printed as Exhibit I, annexed to petition, at page 20 hereof.

EXHIBIT 3

This exhibit is printed as Exhibit II, annexed to petition, at page 28 hereof.

[fol. 142]

EXHIBIT 4

The Berwind-White Coal Mining Company

Summary of Sales to Customers in Connection with Whom Sales Tax Has Been Assessed for the Period from December 10, 1934, to December 31, 1935

	Dec. 10, 1934 to Feb. 28, 1935	Mar. 1, 1935 to May 31, 1935	June 1, 1935 to Aug. 31, 1935	Sept. 1, 1935 to Dec. 31, 1935	Total
Term Contracts:					
All America Cables, Inc	$ 1,880.46	——	$ 2,713.06	$ 2,236.61	$ 6,830.13
Arbuckle Brothers	1,826.34	$ 6,231.62	4,199.99	8,545.18	20,803.13
Brooklyn Edison Company	536,347.34	602,352.89	513,013.56	815,451.04	2,467,164.83
Clyde & Mallory Lines	4,074.92	4,429.46	4,454.44	6,749.44	19,708.26
L. A. Dreyfus Company	1,569.54	1,388.24	1,706.01	1,469.60	6,133.39
French Line	3,278.60	2,890.00	2,218.72	3,900.74	12,288.06
Interborough Rapid Transit	512,301.32	466,398.97	505,756.56	553,747.43	2,038,204.28
International Mercantile Marine	4,249.62	1,634.94	——	3,316.59	9,201.15
*New England Steamship Company	35,036.02	13,993.85	——	——	49,029.87
New York Edison Company	394,866.77	233,369.03	321,282.84	678,954.03	1,628,472.67
New York & Porto Rico Steamship Company	334.80	——	——	——	334.80
Ocean Dominion Steamship Company	——	——	——	1,023.76	1,023.76
Spanish Line	16,399.26	10,111.50	13,979.64	40,758.90	81,249.30
United Electric Light & Power Company	96,719.15	226,671.20	86,246.27	——	409,636.62
Williamsburgh Power Plant Corporation	149,839.20	163,634.26	150,023.82	232,903.68	696,400.96
Total Term Contracts	$1,758,723.34	$1,733,105.96	$1,605,594.91	$2,349,057.00	$7,446,481.21
Spot Contracts:					
Austin, Nichols & Co. (f. o. b. mines)	$ 2,180.27	$ 361.58	$ 239.41	$ 1,520.90	$ 4,302.16
Caddell Drydock & Repair Company	529.15	1,036.39	——	720.52	2,286.06
*New England Steamship Company	——	23,424.36	53,958.13	——	77,382.49
North Atlantic & Gulf Steamship Company	1,863.53	——	——	——	1,863.53
Pioneer Terminal Corporation	3,057.84	——	——	——	3,057.84
U. S. Navigation Company	——	2,566.80	——	——	2,566.80
Total Spot Contracts	$ 7,630.79	$ 27,389.13	$ 54,197.54	$ 2,241.42	$ 91,458.88
Together	$1,766,354.13	$1,760,495.09	$1,659,792.45	$2,351,298.42	$7,537,940.09

* Term Contract expired March 31, 1935.

[fol. 143] EXHIBIT 5

The Receivers of the Interborough Rapid Transit Company may require during the twelve months, beginning April 1, 1934, approximately 800,000 gross tons of semi-bituminous run-of-mine coal.

Bids are invited for the furnishing of any part of the supply.

Successful bidders will be required to execute contracts specifying character and quality of coal, and penalty for failure to meet standard.

Copy of form of contract, or any further information, may be had upon application at the office of the Receivers.

Bids must be sealed and addressed to—

Receivers of Interborough Rapid Transit Company,
Room 1209, 165 Broadway, New York City

marked "Bids for Coal Supply," and must be received there not later than noon, Thursday, March 1, 1934.

The Receivers reserve the right to reject any or all bids, or to award to any bidder, any lesser portion of the tonnage offered.

Victor J. Dowling, Thomas E. Murray, Jr., Receivers
of Interborough Rapid Transit Company.

New York, February 17, 1934.

To—Berwind White Coal Mining Company, #1 Broadway, New York City.

[fol. 144] It is to be understood that contracts are to be considered as "requirement" agreements and that tonnages expressed are estimates.

All bids must be on the basis of gross ton, delivered free alongside the Company's power house docks at 58th Street and North River, and 74th Street and East River, respectively, and must be on the basis of coal equal to the Company's standard, subject to deductions as specified in contract. Delivery to be in the manner specified in form of agreement hereto attached.

Bids must be accompanied by an average or typical analysis of the coal proposed to be furnished, and must also specify the name of the producing mine, its location, latest yearly output, shipping point and route to New York.

Bids will be considered from only bonafide coal mine operators, or their authorized sales agents, provided, however, written authorization accompanies bid.

Each bid must be accompanied by a sworn statement that such bid is made without any connection with any other person, firm or corporation making a bid for the same purpose and is in all respects fair and without collusion or fraud.

Successful bidders will be required to deposit surety bond conditioned on faithful performance of all terms of the contract in an amount equal to 25% of the amount of the contract, but not less than $50,000 nor more than $100,000, and each bid must be accompanied by written evidence from a satisfactory surety company of willingness to furnish such bond.

[fol. 145] EXHIBIT 6

The Berwind-White Coal Mining Company, New York

February 28, 1934.

Receivers of the Interborough Rapid Transit Company, 165 Broadway, New York City, N. Y.

Gentlemen:

We beg to acknowledge and thank you for your letter of February 17th, enclosing specifications covering the conditions governing bids on your coal requirements at New York over a period of one year commencing April 1st, 1934, and expiring March 31st, 1935.

We have submitted these specifications to the Code Authority of Eastern Sub-Division of Division No. 1, under whose jurisdiction we operate, and have been advised by them that certain clauses do not conform to the standard terms of sale as authorized by them, and, further, that they so notified you in detail under date of February 26th.

It is, therefore, understood that this bid is subject to modification of your specifications, in conformity with the letter dated February 26th, referred to above.

For four hundred thousand (400,000) gross tons at a price of $5.232 per gross ton.

Delivery conditions similar to last year.

Coal to be Berwind's Eureka.

[fol. 146] You have asked for the analysis of our coal, and we beg to submit as follows the average analysis of the coal supplied to you last year:

Volatile	16.60	Sulphur	1.35 (dry basis)
Fixed Carbon	76.64	B. T. U.	14,673 " "
Ash	6.76	F. P. A.	2,700° F.
	100.00%	Moisture	3.51

Our Eureka Coal is produced from Mines Nos. 35, 36, 37, 40, 42 and Maryland Shaft, located at Windber, Somerset County, Pennsylvania.

The output of our Pennsylvania Operations for 1933 was approximately 2,200,000 tons.

This coal is transported from our mines to New York entirely over the Pennsylvania Railroad,—the shipping point being Windber, Pennsylvania.

Trusting that this proposal will meet with your entire satisfaction, we remain

Very truly yours, Charles E. Dunlap, President.

CED:C.

[fol. 147] EXHIBIT 7

Interborough Rapid Transit Company
165 Broadway
New York

Thomas E. Murray, Jr.,
Receiver.

March 27th, 1934.

The Berwind-White Coal Mining Company,
1 Broadway,
New York City.

DEAR SIRS:

This will confirm oral advice that you have been awarded a contract for 400,000 gross tons of R.O.M. Bituminous Coal of the character specified in your proposition of February 28th, 1934, at a price of $5.232 per ton, as part of the Receiver's requirements for the year beginning April 1, 1934.

It is understood that formal contract, substantially as already submitted to you but modified as the result of the letter from the Chairman of the Code Authority of your

District, dated February 26th, will be executed as soon as the award has been approved by the Transit Commission.

Very truly yours,

Thomas E. Murray, Jr., Receiver.

[fol. 148] EXHIBIT 8

Interborough Standard "A" Coal

Agreement entered into at New York City this 1st day of April, 1934, whereby the Berwind-White Coal Mining Company, a corporation of the State of Pennsylvania, (hereinafter referred to as the Seller) agrees to sell, and Thomas E. Murray, Jr., as Receiver of Interborough Rapid Transit Company, of No. 165 Broadway, New York City (hereinafter referred to as the Buyer) agrees to buy, during the twelve months beginning April 1, 1934, and ending March 31, 1935, a part of the Buyer's estimated requirements of coal in the allotted amount of 400,000 tons of 2240 pounds, free-burning R/M coal of the standard of quality hereinafter specified, to be known as "Interborough Standard 'A' Coal," with the option to the Buyer to increase or decrease the allotment 20%; and it is further understood that this contract is based upon the estimated requirements of the Buyer and that if during the term of this contract the requirements of the Buyer shall be materially changed due to the fact that the Buyer shall cease to supply power to the New York Railways Company and other railroads, or shall cease to operate the 74th Street (East River) power station, then the allotment of 400,000 tons under this contract shall from such time be reduced in proportion as the total requirements of the Buyer shall be reduced; less such amount as the Seller is unable to deliver or the buyer is unable to receive on account of the following contingencies or causes affecting the production, shipment, delivery or receipt of coal to be shipped under this contract, viz.: strikes, [fol. 149] lockouts, confiscation by railroads, labor agitations, accidents, car shortage, contingencies of transportation or navigation, action of any governmental agencies or any cause beyond the control of either party of this contract except as herein expressly provided.

Shipments to be made as follows:

To Thomas E. Murray, Jr., Receiver

Interborough Rapid Transit Company, at New York, N. Y., and in as near equal monthly instalments as possible (due allowance being made for the seasonal variation of the Buyer's requirements) during the period beginning April 1, 1934, and ending March 31, 1935, subject to the above-mentioned contingencies and causes, and the following terms and conditions:

(1) The Seller reserves the right to incur obligations for the sale of coal from its mines during all periods when deliveries required under outstanding obligations, plus requirements for Seller's coke ovens, do not in the aggregate, exceed the physical capacity of said mines. In the event of contingencies or causes restricting the production or shipment from the Seller's mines, the Buyer shall be entitled to receive hereunder in any one month, only that proportion of the tonnage herein contracted as actual total shipments in available coal car equipment bear to (a) rated capacity of said mines (as determined by Railroad Car Distribution Rules) or to (b) physical capacity of said mines in case rated capacity shall have been reduced by contingencies or causes of the character herein referred to; and where contingencies or causes affecting delivery of coal, affect deliveries to other [fol. 150] Seller's customers, as deliveries to Buyer, the Seller agrees to pro-rate available facilities for delivery among all of its customers so affected, including Buyer, in proportion to the amount of coal that each is entitled to receive.

(2) Subject to the foregoing stipulation that shipments shall be in as nearly equal monthly instalments as possible, with due allowance for seasonal variation of the Buyer's requirements, the Superintendent of Motive Power of the Buyer shall prepare and send to the Seller weekly a schedule of deliveries for the next ensuing seven days.

Should the Seller, for any reason, fail to deliver coal in accordance with the aforesaid schedule, the Buyer will be at liberty to buy coal in the open market. Unless such failure by the Seller to make deliveries according to schedules are due to the causes beyond his control hereinbefore mentioned, the Seller shall be considered in default and the Seller shall make good to the Buyer any difference there may be between the price paid by the Buyer for said coal in

the open market and the price the Buyer would have paid to the Seller had the coal been delivered according to Schedule, or, said differences may be deducted from any money then due or there-after to become due to the Seller under this agreement.

Failure to ship or receive coal, for any reason whatsoever, to the full extent of the monthly instalment in any one month, shall not require (or give the option to) either party to ship or receive in subsequent months the amount of coal not shipped or received during the month in question.

(3) Price from April 1, 1934 to and including March 31, 1935, $5.232 per gross ton of 2240 pounds, free alongside [fol. 151] at 59th Street (North River) and 74th Street (East River) power stations of Buyer, except as the price may be modified as hereinafter provided. Payment for coal delivered during each month shall be made on or before the 20th day of the succeeding month.

(4) The Seller shall at all times assume all responsibility and liability for the lighter and the coal contained therein, and shall furnish all ropes necessary to secure the lighter at the Buyer's docks. The Buyer will, however, furnish the labor necessary at the dock to tie up or shift the lighters, but the men performing such labor shall act only under the direction of the lighter captain, the Seller hereby agreeing to assume all responsibility for the acts of the Captain of the lighter.

(5) All coal shall be delivered in self-trimming lighters similar to those known as "State Boats," which must contain at least 700 tons. Should any lighter contain less than 700 tons, a deduction of fifteen cents (15¢) per ton will be made from the price, in addition to any other deduction provided herein. Should coal be delivered in a lighter which, in the judgment of the Superintendent of Motive Power, for the Buyer, is not self-trimming, a deduction of fifteen cents (15¢) per ton will be made from the price, in addition to any other deduction provided herein. The aforesaid deductions shall be made by the Buyer from the moneys due the Seller hereunder as such amounts become due.

(6) The price named in this contract is based on the present railroad rates and vessel rates and taxes imposed by the United States Government, for or in respect of move-

ment from mines to points named in Clause (3) hereof. [fol. 152] Should there be any increase or decrease in any of such rates or taxes, during the life of this contract, the price of any tonnage to be delivered hereunder shall, on the effective date of each such change be correspondingly increased or decreased. The price named in this contract is also subject to increase or decrease to the extent that the expenses of the Seller are increased or decreased: (1) by any change in the scale of wages in effect at the mines of the Seller at the date hereof; (2) by any State or Federal legislation and/or regulation including manufacturers, sales and excise taxes.

(7) Vessel's bill-of-lading weight, as determined by Railroad Company over whose piers coal is dumped, to govern all settlements.

(8) Failure of Buyer to comply with this contract, shall give the Seller the right to cancel this contract, but waiver of this right, in any instance, shall not prevent the subsequent exercise of it by the Seller or prejudice the Seller's claim for Damages resulting from such default of Buyer.

(9) The measure of damages in the case of default by either party shall be limited to the difference between the market price and the contract price at the time and place of delivery.

(10) The provisions, terms, or conditions of this contract cannot, at any time, be varied or modified, except with the express approval (evidenced by letter or telegram) of the officer of the Seller originally approving this contract, or his successor in office.

(11) The Seller agrees to make such further reduction in the price of the coal supplied by it as may be necessary to meet the minimum price at which coal of the same quality is supplied by it on contract to any other traction or public utility customer in the District. Any reduction to which the Buyer may be entitled shall be computed from the date of the [fol. 153] new contract carrying the lower price, provided, however, that during the continuance of the Eastern Bituminous Code Authority, or any successor authority, the price of coal delivered hereunder shall not by reason of such reduction be less than the code prices fixed and established by said authority applicable to the Seller, for the time being, for

coal at the point of delivery herein specified of the character and quality hereby contracted for.

(12) Coal must be of good steam, coking, run of mine, free-burning, semi-bituminous coal, free from all dirt and excessive dust, a dry sample of which will approximate the "Interborough Standard 'A' Coal" in heat value and analysis, as follows:

Carbon	Volatile Matter	Ash	B.T.U.'s	Sulphur
73.25	20.	6.75	14,641	1.50

Samples of coal shall be selected for analysis and analyses shall be made in accordance with the provisions of the schedule hereto annexed and made part of this contract and marked:

"Method of sampling and analyzing for "Interborough Standard 'A' Coal'."

(13) It is expressly understood and agreed that the chemical analysis and heat value of coal are not sufficient criteria for determining whether the Seller's coal has the necessary combustion characteristics to meet the Buyer's requirements. The combustion characteristics of any coal, in its relation to boiler capacity, firing, etc., can be determined only by experience under actual operating conditions. Should the Seller's coal not have the combustion characteristics required to produce under actual operating conditions the same result as is being obtained with coal now in use having the same approximate chemical analysis, the Buyer [fol. 154] may refuse to receive the Seller's Coal during any period within the term of this agreement, or to reject any lighter or lighters of coal to be delivered by the Seller. It is agreed that the Seller shall have the right to investigate the plant conditions requiring the rejection of such coal, but the decision of the Superintendent of Motive Power for the Buyer is to be final with respect to such rejection.

(14) Simultaneously with the execution of this contract, and before it shall be or become binding upon the Buyer, the Seller shall deliver to the Buyer a bond in the form attached hereto and made a part hereof, executed by the Seller and a surety, or sureties, approved by the Buyer, in the sum of $100,000.00 dollars as security for the faithful performance of this contract by the Seller.

(15) This contract is entered into, subject to the approval of the Transit Commission of the State of New York.

In Witness Whereof, the parties hereto have caused this agreement to be executed by their proper officers thereunto duly authorized, and their respective corporate seals to be affixed, the day and year first above written.

Thomas E. Murray, Jr., as Receiver of Interborough Rapid Transit Company. By Geo. Keegan, General Manager for the Receiver, Berwind-White Coal Mining Company. By Charles E. Dunlap, President. (Seal.)

Approved as to form V.U. 4/13/34.

Attest: O. M. Hinton A. Secretary

[fol. 155] Method of Sampling and Analyzing for "Interborough Standard 'A' Coal"

The words "Company" and "Contractor" as used herein, refer to the "Buyer" and "Seller", respectively, as defined in the foregoing contract.

Method of Sampling Coal for Analysis.—A small quantity or sample of coal will be taken automatically from each alternate weighing hopper while the hopper is being dumped and the lighter being unloaded, and allowed to drop into a receptacle, until about 200 pounds have accumulated. This bulk of coal will be crushed and quartered successively to about ten pounds and placed in a box. The receptacle will then be filled again when the same operation of crushing and quartering will be continued until the lighter has been unloaded. The contents of the box will then be crushed and quartered down to about two pounds, which, after being pulverized in a mill, will be taken for chemical analysis. This average sample of coal will be labelled and held for one week after the unloading of the lighter. The sample will be analyzed as soon as possible after being taken. No other sample will be recognized.

Analysis.—Analysis of dry sample taken from average sample will be made by the Company's chemist under the supervision of the Superintendent of Motive Power. Should

the Contractor question the results of the Company's test (a copy of which will be mailed to him), the Company will, if requested by the Contractor within three (3) days after copy of test has been mailed to him, forward sufficient quantity of the average sample taken from each weighing hopper to any laboratory in the City of New York which may be agreed upon by the Superintendent of Motive Power and Contractor, and have said sample analyzed by it and the [fol. 156] results obtained from this second analysis will be considered as final and conclusive. In case the questioned values as obtained in the Company's analysis shall be found by the second analysis to be 2 per cent, or less in error, then the cost of said second analysis shall be borne by the Contractor, but if the disputed values shall be found to be more than 2 per cent, in error, then the cost of second analysis shall be borne by the Company.

Should there be no question raised by the Contractor within the three (3) days specified, as to the values in the first analysis the average sample of coal will be destroyed at the end of seven (7) days from date of discharge of coal from lighter. Should a second analysis be made of coal taken from any lighter as herein provided, then the calculation to be made as set forth in paragraph under "deductions" will be based on the results as obtained from the second analysis.

All analyses will be made in accordance with the standard adopted by the American Society for Testing Materials with the exception of the volatile matter which will be determined by heating for 7 minutes in covered 30 gram platinum crucible.

The method of determination of the heat value of the coal will be by the Atwater-Mahler Bomb Calorimeter, standardized against standard samples of known heat value, either Napthaline, Benzoic Acid or Sucrose as obtained from the National Bureau of Standards at Washington.

(Acknowledged on the 4th day of March, 1935, by Charles E. Dunlap, and on the 12th day of March 1935, by George Keegan. Bond of United States Guarantee Company attached.)

[fol. 157] EXHIBIT 9

The Berwind-White Coal Mining Company, New York

January 3, 1935.

Mr. Thomas E. Murray, Jr., Receiver, Interborough Rapid Transit Company, 165 Broadway, New York, N. Y.

MY DEAR MR. MURRAY:

Referring to your inquiry of to-day, we herewith offer to contract with you for your coal requirements for the year beginning April 1st, 1935, and terminating March 31st, 1936, at the following prices:

$5.512—between April 1st, 1935, and June 16th, 1935, inclusive;
$5.288—between June 17th, 1935, and August 31, 1935, inclusive;
$5.40 —between September 1st, 1935, and March 31st, 1936, inclusive.

The above prices are per gross ton delivered alongside your Dock within the Harbor Limits.

The coal to be supplied will be Berwind's Standard Eureka Run-of-Mine, and the quantity offered at the above prices will be a maximum of 400,000 gross tons, 10% more or less.

[fol. 158] All other general conditions as outlined in our current contracts are to apply, in addition to which the following two clauses will be inserted:

"Special Conditions: If, during the life of this contract, the Code price for the kind and grade of coal covered by this contract be reduced, then such reduced price shall be substituted for the contract price on all coal delivered hereunder while such reduced price is in effect.

Should the Coal Code and its resultant association be abandoned, the parties to this contract agree to and, on reasonable notice, will confer as to a fair market price for the coal to be delivered. If an agreement cannot be reached as to the price on coal to be delivered, the contract may be cancelled on thirty (30) days' notice."

Very truly yours, Charles E. Dunlap, President.

CED:C.

[fol. 159] EXHIBIT 10

Thomas E. Murray, Jr., Receiver Interborough Rapid Transit Company,

No. 165 Broadway, New York

George Keegan, General Manager for Receiver.

January 4, 1935.

The Berwind-White Coal Mining Co., 1 Broadway, New York City.

Attention of Mr. Charles E. Dunlap, President

DEAR SIRS:

In response to your letter addressed to Receiver Thomas E. Murray, Jr., under date of January 3rd, 1935, submitting a proposition to supply a portion of our coal requirements for the year ensuing April 1, 1935, and in confirmation of your conversation with Mr. Starbard this afternoon, I am authorized by the Receiver to accept, subject to the approval of the Transit Commission, your proposal for 75% to 100% of the quantity covered by your present contract, the exact quantity to be determined later, upon the same terms and conditions as contained in our present contract.

It is understood that if during the life of this contract the Coal Code price for the kind and grade of coal covered by this contract shall be reduced so as to establish a price less than the price quoted under this contract, then such re-[fol. 160] duced price shall be substituted for the contract price on all coal delivered under this contract while such reduced price is in effect; and, further, that if the Coal Code shall be abandoned, then the Receiver may, upon thirty days' written notice, cancel this contract.

Very truly yours, Geo. Keegan, General Manager for Receiver.

EXHIBIT 11

This exhibit is omitted. It is a contract between petitioner and Thomas E. Murray, Jr., as Receiver of Interborough Rapid Transit Company, similar to the contract printed as Exhibit 8 at page 148 hereof, but covering the period beginning April 1, 1935 and ending March 31, 1936. See stipulation at page 195 hereof.

[fol. 161] EXHIBIT 12

Code Contract Number: N. Y. 3-34.

Agreement for the Sale and Purchase of Coal

Parties

Agreement made at the City of New York this seventh day of February 1934, by and between The Berwind-White Coal Mining Company of New York City, N. Y. (hereinafter referred to as the Seller) and The New York Edison Company of No. 4 Irving Place, New York City (hereinafter referred to as the Buyer):

Consideration and Quantity

(1) In consideration of the following terms and conditions, the Seller agrees to sell and deliver and the Buyer to buy and accept, alongside Buyer's stations in New York Harbor, approximately two hundred and twenty thousand (220,000) gross tons of Standard Eureka run of mine and one hundred and eighty thousand (180,000) gross tons of 2" nut and slack B seam bituminous coals from the Seller's mines in Cambria and Somerset Counties, Pa.

Quality

(2) It is understood that this coal is to be used by the Buyer in the generating of electrical current for public distribution for light, heat and power purposes, and as the quality of the coal is an essential consideration, it is agreed that the analysis of each cargo of coal delivered under this contract shall be within the following specifications:

[fol. 162]

Dry Basis	
Volatile	not to exceed 20%
Fixed Carbon	to be in excess of 72.5%
Ash	not to exceed 7.5%
Sulphur	not to exceed 1.75%
B. T. U.'s	to be in excess of 14500
Fusibility	to be in excess of 2500° F.

It is further mutually agreed that the coal delivered hereunder shall also meet the operating requirements of the Buyer's Engineers at each of the stations where it is to be consumed.

Delivery

(3) Delivery to be made during the year ending March 31, 1935 of the run of mine coal, at the rates approximately, of 3200 tons a week during the months of April, May, June and July: 4200 tons a week during the months of August, September and October: 5200 tons a week during the months of November, December, January and February and 4200 tons a week during the month of March.

Delivery of the 2" nut and slack to be made at the rates approximately of 2100 tons a week during the months of April, May and June; 3800 tons a week during the months of July and August; 4700 tons a week during the months of September and October; 4000 tons a week during the months of November, December, January and February; 2200 tons a week during the month of March.

It is also mutually agreed that the Buyer may, at any time, upon 15 days' notice in writing to the Seller, increase or decrease any or all of the deliveries thereafter to be made hereunder by an amount not to exceed 20%.

[fol. 163] Such delivery and acceptance to be subject to strikes, accidents, car shortage and other causes beyond the control of either party. Over-shipment during any week shall not be considered to be delivery on account of any other week without the approval of the Buyer.

In the event of the Seller being unable to make the full weekly deliveries because of strikes or other causes previously specified, the Seller agrees that the amount of coal delivered under this contract shall be at least equal (in the per cent that the amount delivered bears to the contract requirement) to deliveries to any other of the Seller's customers, but that the full amount of coal shall be delivered weekly under this contract before there are any deliveries on account of the Seller's "spot" orders.

It is mutually understood that, in the event the Seller is unable at any time to supply the quantity of the size of coal specified in this contract, it will substitute another size from the same mine or mines to make up the contract tonnage.

Consignment

(4) Shipments are to be consigned to the Buyer alongside its power stations, New York City, as directed.

Price

(5) The price to be paid for run of mine coal delivered under this contract shall be Five Dollars and Twelve Cents ($5.12) a gross ton alongside Buyer's stations at 38th to 40th Streets and East River, and Five Dollars and Seventeen Cents ($5.17) a gross ton alongside Buyer's stations at 132nd Street and East River; and for 2" nut and slack [fol. 164] coal delivered under this contract the price to be paid shall be Four Dollars and Ninety-five Cents ($4.95) a gross ton alongside Buyer's stations at 38th to 40th Streets and East River and Five Dollars ($5.00) a gross ton alongside Buyer's stations at 132nd Street and East River, such delivery to be made in barges of types and sizes required by the Buyer.

These prices are based on the present rates of Wages paid to miners and day laborers at the above mine or mines of the Seller and upon the present railroad freight rates from these mines to New York Tidewater; and in the event of change in any of these rates of wages affecting the cost of production of coal delivered hereunder, or change in such railroad freight rates, there shall be a corresponding change in the above prices.

It is mutually agreed that, in the event of any change in the present agreement between the Seller and its mine workers affecting the number of hours worked in a week and the effect of such change on the cost of producing coal in the district in which the above mine is located, the above price will be changed to cover such increase or decrease in the cost in the amount approved by the Code Authority.

It is also mutually agreed that, if the Code Authority shall reduce the price of coal of the above grade to a price lower than that herein provided, such lower price shall be the price to be paid for coal delivered hereunder while such lower price is in effect.

If at any time during the period of this contract the Seller shall sell any coal of the same grade as that to be delivered hereunder from the above mines on contract at a price less than that specified herein, the Buyer shall have [fol. 165] the right to cancel the unfilled portion of this contract, unless the Seller shall agree, during the period the lower price is in effect, to reduce the price of coal delivered hereunder to such lower price.

Terms of Payment

(6) The Buyer agrees to make payment on the 15th of each month for deliveries made during the preceding calendar month, and the Seller agrees to render bills as promptly as possible.

It is mutually agreed that railroad weights shall govern all settlements.

The Seller agrees to furnish the Buyer a statement of the numbers of the railroad cars that go to make up each boat cargo, the size of coal contained in each car and the mine from which it was shipped.

Federal and State Legislation

(7) If any law becomes effective after the date hereof, imposing a sales tax payable by the Seller, because of sales, deliveries or orders hereunder the Buyer shall pay the Seller so much of such tax as applies to the deliveries hereunder.

(8) This agreement shall be binding upon and enure to the benefit of the parties hereto, their successors and assigns.

In Witness Whereof the parties hereto have signed and delivered this agreement the day and year first above written.

(Executed by Charles E. Dunlap, for Berwind-White, and by W. W. Erwin, for New York Edison.)

[fol. 166] Exhibits 13-16

These exhibits are omitted. (See stipulation at page 195 hereof. Exhibits 14 to 16 inclusive are contracts between petitioner and the companies listed below, similar to the contract printed as Exhibit 12 at page 161 hereof, but covering the following periods:

Exhibit No.	Company	Period Covered
13	New York Edison Company	4/ 1/35—6/16/35
14	New York Edison Company	6/17/35—3/31/36
15	United Electric Light & Power Company	4/ 1/35—6/16/35
16	United Electric Light & Power Company	6/17/35—3/31/36

EXHIBIT 17

Contract No. NY 2-34

Agreement made at the City of New York this sixth day of February 1934, by and between the Berwind-White Coal Mining Company, of the City of New York, hereinafter referred to as the Seller, and the Brooklyn Edison Company, Inc. of the City of New York, hereinafter referred to as the Buyer.

1. In consideration of the following terms and conditions, the Seller agrees to sell and deliver, and the Buyer to buy and accept, alongside its power plants approximately four hundred and fifty thousand to five hundred and fifty thousand (450,000/550,000) net tons of bituminous coal from April 1-1934 to March 31-1935.

Grade: 450,000 to 550,000 Net Tons, Berwind's Standard Eureka run of mine coal from the Eureka mines located in Cambria and Somerset Counties at or near Windber, Pa. Prior to making this contract the Seller delivered to the [fol. 167] Buyer during March 1932 a cargo of this coal to be tested as to quality for the Buyer's needs and purpose. It is understood by the Seller that the coal to be delivered under this contract shall be generally equal in quality to the coal so tested.

Shipments: The Buyer will give notice each month of the tonnage desired during the succeeding month which will be within the limits of 1/12 of the maximum and minimum annual requirements stipulated above—unless otherwise mutually agreed—and deliveries shall be made to meet these needs.

Weight: Net weights, as determined by the railroad scales nearest loading point, shall govern all settlements.

Price: Five dollars and twelve cents ($5.12) per gross ton alongside Buyer's power plants.

Terms of Payment: Bills for shipments in any month shall be presented by the Seller not later than the fifth day of the following month, and be paid by the Buyer within fifteen days after such presentation.

Expiration: This contract expires March 31, 1935.

2. It is understood and agreed that the price named in this contract is based upon the present wages and freight rates. Should there be any general change in cost, caused by tax legislation or by changes in wages, or by railway

rates, the price herein stated will be increased, or decreased accordingly by the amount that such cost is increased or [fol. 168] decreased above or below the costs on which this contract price has been determined; or if this grade of coal during the period of this contract is contracted under similar circumstances by the Seller to any other buyer in the New York Metropolitan District at a lower price, the price herein stated will thereafter be decreased accordingly.

3. Delivery and acceptance of coal hereunder shall be subject to strikes, accidents and other causes beyond the control of either party, provided that prompt written notice of the existence of such strikes, accidents or other causes is given, and in case of any interruption from such sources, the Seller agrees to make up the deliveries that would have been required hereunder during the period of such interruption only on written request from the Buyer.

In witness whereof the parties hereto have signed and delivered this agreement the day and year first above written.

(Executed by W. P. Holcombe, for Brooklyn Edison, and by Charles E. Dunlap for Berwind-White.)

EXHIBIT 18

This exhibit is omitted. It is a contract between petitioner and Brooklyn Edison Company, Inc. similar to the contract printed as Exhibit 17 at page 166 hereof, but covering the period from April 1, 1935 to March 31, 1936. See stipulation at page 195 hereof.

[fol. 169] EXHIBIT 19

The Berwind-White Coal Mining Company

Commercial Trust Building, Philadelphia, Pa.

Agreement made and entered into at the City of New York, New York, this 26th day of May, 1934, whereby The Berwind-White Coal Mining Company of Philadelphia, Pennsylvania, hereinafter called the "Seller", agrees to sell and deliver, and the Williamsburgh Power Plant Corpo-

ration of Brooklyn, New York, hereinafter called the "Buyer", agrees to buy and accept, bituminous coal of the quantity and quality, at the prices and on the terms and conditions hereinafter set forth.

Kind of Coal: Berwind's Standard Eureka Run-of-Mine ("B" Seam) Coal, from the Seller's Mines, located in Cambria and Somerset Counties, Pennsylvania.

Mines: Eureka Nos. 35, 36, 37, 40, 42 and Maryland Shaft Mine, owned and operated by The Berwind-White Coal Mining Company.

Quantity: One Hundred Thousand (100,000) gross tons, ten percent (10%) more or less, at the option of the Buyer.

Quality: The quality of Eureka Coal will have substantially the same combustion characteristics as that furnished for the past year, and will conform to the following specifications:

Fixed Carbon	at least	73.25%
Volatile Matter	Not to exceed	20.00%
Ash	" " "	6.75%
Sulphur	" " "	1.50%
B. T. U.	at least	14,641

It is understood that this coal is to be used by the Buyer in the generating of electrical current for light, heat and power purposes.

[fol. 170] Delivery: Deliveries are to be made during the year commencing June 1st, 1934, and ending May 31st, 1935, in approximately equal monthly quantities. Delivery to be subject to events of war, strikes, riots, lock-outs, interruption of transportation; whether general or partial, or other causes beyond our control, affecting the working of this contract, and the Seller will be relieved from all obligation during such time unless changed by mutual agreement.

Consignment: Shipments are to be consigned and delivered to the Buyer alongside the Williamsburgh Power Station, Brooklyn, New York, as directed.

Price: $5.512 per gross ton of 2,240-lbs. alongside Williamsburgh Power Station, Brooklyn, New York.

The price stated herein shall be increased or decreased, as the case may be, by the amount by which the cost of production of the coal shipped hereunder is increased or decreased by any one or more of the following: (1) Any change in the present agreements with mine employees as to wages, provided such change is part of a general change in the

rates of mine employees in the district in which the mines from which the said coal is shipped are located; (2) Any State or Federal tax on coal or on the mining or sale thereof; (3) Any change in the present State or Federal legislation operating to limit the hours of labor; (4) Any other State or Federal rule or regulation.

Whenever any change in the cost of production of the coal shipped hereunder is caused as above provided, the Seller shall promptly present to the Buyer the details with respect thereto and shall thereafter either increase or decrease all invoices relating to said coal by the amount of such change [fol. 171] or, in case any coal whose cost of production has been changed by any of said causes has been shipped hereunder under an invoice that does not reflect such change, issue to the Buyer a debit or credit memorandum thereof.

In the event that the present railroad freight rate of Two Dollars and Seventy-Two Cents ($2.72) per gross ton is changed, the Seller shall receive the benefit of any advances and the Buyer of any reductions therein.

If, during the life of this contract, the Code price for the grade of coal covered by this contract be reduced, then such reduced price shall be substituted for the contract price on all coal delivered hereunder while such reduced price is in effect, but any increase or increases in the minimum Code price now in force shall not increase the contract price hereinabove set forth.

Terms of Payment: The Buyer agrees to make payments on or before the twentieth day of each month for deliveries made during the preceding calendar month, and the Seller agrees to render bills as promptly as possible.

It is mutually agreed that railroad weights shall govern all settlements.

In Witness Whereof, the parties hereto have signed and delivered this agreement the day and year first above written.

The Berwind-White Coal Mining Company, by Charles Dunlap, President.

Accepted:

Williamsburgh Power Plant Corporation, by Geo. W. Jones, Vice President.

WHS

9—475.

[fol. 172] EXHIBIT 20

This exhibit is omitted. It is a contract between petitioner and Williamsburgh Power Plant Corporation, similar to the contract printed as Exhibit 19 at page 169 hereof, but covering the period commencing June 1, 1935 and ending May 31, 1936. See Stipulation at page 195 hereof.

EXHIBIT 21

Copy Contract No. NY 509-34.

The Berwind-White Coal Mining Company

Commercial Trust Building, Philadelphia, Penna.

Agreement made and entered into this sixth day of March, 1934, whereby the Berwind-White Coal Mining Company of Philadelphia, Pennsylvania, agrees to sell and the New England Steamship Company of New Haven, Connecticut agrees to buy, f.o.b. cars Harsimus Pier, Jersey City, New Jersey, approximately Sixty Thousand (60,000) gross tons of Berwind's Eureka coal to be used for bunkering their own vessels, less such amount as the said coal company is unable to ship or the New England Steamship Company is unable to receive, on account of any strike, accident, contingency of transportation, or cause or causes beyond the control of either party, affecting the mining, shipment, transportation, delivery or receipt of coal to be shipped under this agreement.

Kind of Coal: Berwind's Eureka R M coal.

[fol. 173] Quantity: Approximately Fifty Percent (50%) of Buyer's New York Harbor requirements, estimated at about Fifty Thousand (50,000) gross tons. One Hundred Percent (100%) of Buyer's requirements for consignment to New Bedford, Massachusetts, estimated at about Ten Thousand (10,000) net tons.

Contract Period: From April 1, 1934 to March 31, 1935, inclusive.

Price: $5.05 per gross ton f. o. b. cars Harsimus Pier, Jersey City, N. J.

The price or prices named herein shall be increased or decreased to the extent that the expenses of the Seller are increased or decreased; (1) by any change in the scale of wages

in effect at the mines of the seller at the date hereof; (2) by any State or Federal legislation and/or regulation including manufacturers, sales and excise taxes; (3) by any change in the freight rates in effect at the date hereof.

In the event that at any time prior to the expiration of this agreement the Bituminous Coal Code govering the bituminous coal industry is discontinued and/or in the event that the minimum price fixing provisions of such Code are suspended or discontinued and/or in the event that the Bituminous Coal Code permits the substitution of a lower price or prices for the sale of the product provided for in this agreement, then and in any such event the Seller agrees that it will reduce the prices herein fixed to meet competitive prices or permit Buyer to cancel this agreement upon thirty (30) days' written notice to the Seller.

[fol. 174] Delivery to be made to the New England Steamship Company at Harsimus Pier, Jersey City, N. J., in approximately equal monthly quantities, commencing April 1, 1934 and terminating March 31, 1935, subject to the above mentioned contingencies.

The failure to deliver or receive coal in any month or months, on account of any of the above mentioned contingencies, shall not require (or give option to) either party to deliver or receive in subsequent month or months the amount of coal not shipped or received during the period of any such contingency.

Payments to be made on or before the twentieth of each month for coal dumped during the month next previous.

Railroad weights to govern settlements.

The Berwind-White Coal Mining Company, /s/ Charles E. Dunlap, President.

Accepted:

New England Steamship Company, /s/ C. E. Smith, Vice Pres.

[fol. 175] EXHIBIT 22

Contract No. NY 182-35

The Berwind-White Coal Mining Company

One Broadway, New York

Agreement made and entered into this seventeenth day of December 1934, whereby The Berwind-White Coal

Mining Company, a corporation of the State of Pennsylvania, hereinafter called the Seller, agrees to sell and Arbuckle Brothers of 71 Water Street, New York, N. Y., hereinafter called the Buyer, agrees to buy Bituminous Coal of the quantity and quality at the prices and on the terms, stipulations and conditions thereinafter set forth, less such amount as the Seller is unable to ship or the Buyer unable to receive on account of any strike, accident, contingencies of transportation or cause or causes beyond the control of either party effecting the mining, shipment, transportation, delivery or receipt of coal to be shipped hereunder.

Quantity; requirements estimated at about Five Thousand (5,000) net tons, Ten Percent (10%) more or less.

Kind and Grade of Coal: Berwind's C"—¾" Slack from #37 mine and/or #40 mine, at the option of the Seller, subject to the approval by the Buyer.

Contract Period: January 1st, 1935 to December 31st, 1935, inclusive.

Shipments: To be made to Arbuckle Bros. at the foot of Adams Street, Brooklyn, N. Y. in barges, in as near equal monthly proportions as possible.

[fol. 176] Price: No. 37 C"—¾" Slack—$5.046 per gross ton.

No. 40 C"—¾" Slack—$4.99 per gross ton.

The above prices are free alongside at the foot of Adams Street, Brooklyn, N. Y.

If, during the life of this contract, the Code price for the kind and grade of coal covered by this contract be reduced, then such reduced prices shall be substituted for the contract on all coal delivered hereunder while such reduced price is in effect.

Should the Coal Code and its resultant association be abandoned, the parties of this contract agree to and, on reasonable notice, will confer as to a fair market price for the coal to be delivered. If an agreement cannot be reached as to the price on coal to be delivered, the contract may be cancelled on thirty (30) day's notice.

Payment: Cash on or before the 20th day of each month for all coal shipped during the preceding month. All Settlements under this contract are to be governed by the actual railroad weights ascertained as the usual point at which shipments from the mines shipping hereunder are weighed.

The conditions on the reverse side hereof are hereby made a part of this contract.

The Berwind-White Coal Mining Company. /s/ F. D. Seymour. General Sales Manager.

Accepted:

Arbuckle Brothers. /s/ H. P. Pond, Pur. Agt.

[fol. 177] Conditions.

The purchase price of coal specified herein is based in part upon the present cost of production and upon present agreements with mine employees as to wages, and any increase or decrease in the cost of production of coal shipped hereunder caused by changes in such wage agreements shall operate to increase or decrease correspondingly, as the case may be, the price of the coal herein named; provided, that any such increase or decrease in wages shall not be applied to change the price specified herein unless it is a part of a general increase or decrease in the wages of the district in which the mine or mines of the producer, from which the coal is shipped, are located; likewise, any increase or decrease in the cost of production caused by the collection, under State or Federal statutes, to which the Seller is or may become subject, of any tax on coal, or on the mining or production thereof, or on payrolls or wages, or by any subsequent changes in the tax or in the rate thereof, or by Federal or State legislation operating to limit the hours of labor or affecting the conditions of labor, or by any other statute or regulation, State or Federal, increasing or decreasing the cost of production, shall correspondingly increase or decrease said price of coal on any tonnage thereafter shipped hereunder.

Upon presentation of the details with respect to the matters herein set out, affecting the cost of production of coal the Seller shall increase or decrease all invoices on the effective date thereof by the amount of any such increase or decrease, and issue a debit or credit memorandum for the amount of any such increase or decrease, provided any in-

[fol. 178] voices have been rendered at price in effect prior to said change. If freight is included in the price named herein and the present freight rates are changed, the Seller

shall receive the benefit of any advances and the buyer of any reductions therein.

The coal covered by this contract is to be used only in the plant or plants of the Buyer named herein and for the use stated and is not to be sold or diverted by the Buyer to other purposes without the consent of the Seller.

The Seller reserves the right to execute contracts for the sale of the entire estimated production of the mines controlled by the Seller and if the total actual output shall at any time, for any cause, be less than the sum total of deliveries called for by all the Seller's contracts then in force, the total available tonnage shall be applied pro rata on all said contracts alike, upon the basis of percentage of the total tonnage contracted and the Seller shall not be liable to make other or further deliveries for the period covered by such shortage or for damages for failure to deliver the full amount specified.

This agreement is subject in every respect to the rules and regulations of any Federal or State authority or authorities having jurisdiction in the premises to which the Seller is or may become subject.

[fol. 179] EXHIBIT 23

Contract No. N. Y.—107-34

Copy

The Berwind-White Coal Mining Company

Commercial Trust Building, Philadelphia, Pa.

Agreement made and entered into this thirtieth day of June, 1934, whereby The Berwind-White Coal Mining Company of Philadelphia, Pennsylvania, agrees to sell and the L. A. Dreyfus Company of Rosebank, Staten Island, New York, agrees to buy their requirements of bituminous steam coal, estimated at about one thousand five hundred (1500) gross tons, less such amount as the said Coal Company is unable to ship or the L. A. Dreyfus Company is unable to receive, on account of any strike, accident, contingency of transportation, or cause or causes beyond the control of either party, affecting the mining, shipment, transportation,

delivery or receipt of coal to be shipped under this agreement.

Kind of Coal: Berwind's Eureka Run-of-Mine, Berwind's C" Run-of-Mine or Berwind's C"—2" Stoker Coal, at the option of the Buyer.

Quantity: Buyer's requirements, estimated at about one thousand five hundred (1500) gross tons, ten per cent (10%) more or less.

[fol. 180] Price: Berwind's Eureka R/M $5.57 gross ton, Berwind's C" R/M 5.35 gross ton, Berwind's C"—2" Stoker 5.18 gross ton, alongside docks within New York Harbor limits.

Demurrage: Six (6) calendar days will be allowed free from date of delivery. Seven Dollars ($7.00) per day, per barge, will be charged thereafter.

Contract Period: August 1, 1934, to July 31, 1935, inclusive.

If during the life of this contract the Code price for the grade of coal covered by this contract be reduced, then such reduced price shall be substituted for the contract price on all coal delivered hereunder while such reduced price is in effect.

The purchase price of coal specified herein is based in part upon the present agreements with mine employees as to wages, and any increase or decrease in the cost of production of coal shipped hereunder caused by changes in such wage agreements, shall operate to increase or decrease correspondingly, as the case may be, the price of the coal herein named, provided, that any such increase or decrease in wages shall not be applied to change the price specified herein unless it is a part of a general increase or decrease in wages in the district in which the mine or mines of the producer, from which the coal is shipped, are located; likewise, any increase or decrease in the cost of production, [fol. 181] caused by the imposition, by State or Federal statutes, of a direct tax on coal, or on the sale or on the mining thereof, or by subsequent changes in the rate of such tax, or by Federal or State legislation operating to limit the hours of labor, or by any other regulations, State or Federal, increasing or decreasing the cost of production, shall correspondingly increase or decrease said price of coal on any tonnage thereafter shipped hereunder.

. . . . . .

If an advance in price should be made to an extent which the Buyer considers unfair, the Buyer will have the privilege of cancelling this agreement.

(Sgd.) L. A. Dreyfus Co., Walter A. Tyler, Vice-President, (Sgd.) Fred'k. D. Seymour.

. . . . . .

Upon presentation of the details with respect to the matters herein set out, affecting the cost of production of coal the Seller shall increase or decrease all invoices on the effective date thereof by the amount of any such increase or decrease, and issue a debit or credit memorandum for the amount of any such increase or decrease, provided any invoices have been rendered at price in effect prior to said change. If freight is included in the price named herein and the present freight rates are changed, the Seller shall receive the benefit of any advances and the Buyer of any reductions therein.

The coal covered by this contract is to be used only in the plant or plants of the Buyer named herein and for the use [fol. 182] stated and is not to be sold or diverted by the Buyer to other purposes without the consent of the Seller.

Shipments to be made to the L. A. Dreyfus Company, Rosebank, Staten Island, New York, alongside docks within the harbor limits of New York, in approximately equal monthly quantities, commencing August 1, 1934, and terminating July 31, 1935, subject to the above mentioned contingencies.

The failure to ship or receive coal in any month or months, on account of the above mentioned contingencies, shall not require (or give option to) either party to ship or receive in subsequent month or months the amount of coal not shipped or received during the period of any such contingency.

Payments to be made on or before the fifteen (15th) day of the month following month in which coal was shipped.

Railroad weights to govern settlements.

The Berwind-White Coal Mining Company, by (Sgd.) Fred'k. D. Seymour, Acting General Sales Manager.

Accepted: L. A. Dreyfus Company, by (Sgd.) Walter A. Tyler, Vice-President.

[fol. 183] EXHIBIT 24

Copy NY 107-35

The Berwind-White Coal Mining Company

1 Broadway, New York

Agreement made and entered into this—twenty ninth—day of July 1935, whereby The Berwind-White Coal Mining Company, a corporation of the State of Pennsylvania, hereinafter called the Seller, agrees to sell and L. A. Dreyfus Company of Rosebank, Staten Island, New York, hereinafter called the Buyer, agrees to buy Bituminous Coal of the quantity and quality at the prices and on the terms, stipulations and conditions hereinafter set forth, less such amount as the Seller is unable to Ship or the Buyer is unable to receive on account of any strike, accident, contingency of transportation or cause or causes beyond the control of either party affecting the mining, shipment, transportation, delivery or receipt of coal to be shipped hereunder.

Quantity: Buyer's requirements estimated at approximately One Thousand Five Hundred (1,500) gross tons.

Kind and Grade of Coal: Berwind's Eureka Run-of-Mine or
Berwind's C' (Prime) Run-of-Mine or
Berwind's C' (Prime) –2" Stoker coal.

Contract Period: August 1st, 1935 to July 31st, 1936 inclusive.

Shipments: To be made to L. A. Dreyfus Company, Rosebank, Staten Island, New York, as directed and in as nearly equal monthly proportions as possible.

Price: Eureka R/M..... $5.572 gr ton alongside Buyer's dock, St. Is., N. Y.
C' R/M..... 5.292 " " " " " " " " "
C'–2" Stoker..... 5.124 " " " " " " " " "

The emergency railroad freight surcharge of 16.8¢ per gross ton is to be added to the above prices so long as it is in effect.

If an advance in price should be made to an extent which the Buyer considers unfair, the Buyer will have the privilege of cancelling this agreement.

[fol. 184] Six (6) calendar days will be allowed free from date of delivery. Seven Dollars ($7.00) per day, per barge, will be charged thereafter.

Payment: Cash on or before the twentieth (20th) day of each month for all coal shipped during the preceding month. All settlements under this contract are to be governed by the actual railroad weights ascertained at the usual point at which shipments from the mines shipping hereunder are weighed.

The conditions on the reverse side hereof are hereby made a part of this contract.

The Berwind-White Coal Mining Company, (Sgd.) Fred'k D. Seymour, General Sales Manager.

Accepted: L. A. Dreyfus Company, (Sgd.) Walter A. Tyler, Vice-President.

Conditions

The purchase price of coal specified herein is based in part upon the present agreements with mine employees as to wages and any increase or decrease in the cost of production of coal shipped hereunder caused by changes in such wage agreements, shall operate to increase or decrease correspondingly, as the case may be, the price of the coal herein named; provided, that any such increase or decrease in wages shall not be applied to change the price specified herein unless it is a part of a general increase or decrease in wages in the district in which the mine or mines of the producer, from which the coal is shipped, are located; likewise, any increase or decrease in the cost of production, caused by the imposition, by State or Federal statutes, of [fol. 185] a direct tax on coal, or on the sale or on the mining thereof, or by subsequent changes in the rate of such tax, or by Federal or State legislation operating to limit the hours of labor, or by any other regulations, State or Federal, increasing or decreasing the cost of production, shall correspondingly increase or decrease said price of coal on any tonnage thereafter shipped hereunder.

Upon presentation of the details with respect to the matters herein set out, affecting the cost of production of coal the Seller shall increase or decrease all invoices on the effective date thereof by the amount of any such increase, and issue a debit or credit memorandum for the amount of any such increase or decrease, provided any invoices have been rendered at price in effect prior to said change. If freight is included in the price named herein and the present freight rates are changed, the Seller shall receive the benefit of any advances and the Buyer of any reductions, therein.

The coal covered by this contract is to be used only in the plant or plants of the Buyer named herein and for the use stated and is not to be sold or diverted by the Buyer to other purposes without the consent of the Seller.

The Seller reserves the right to execute contracts for the sale of the entire estimated production of the mines controlled by the Seller, and if the total actual output shall at any time, for any cause, be less than the sum total of the deliveries called for by all of the Seller's contracts then in force the total available tonnage shall be applied pro rata on all of said contract alike, upon the basis of the percentage of the total tonnage contract; and the Seller shall not be liable to make other or further deliveries for the period covered by such shortage or for damages for failure to deliver the full amount specified.

[fol. 186] EXHIBIT 25

Copy.

Austin, Nichols & Co., Inc.
Kent Ave. N 3rd St. and East River
Brooklyn, N. Y.

Date: 12-26-34.

Please furnish for our account on Order No. 1810M.

Price

2 cars R/M Bituminous Coal Berwind C, same as last—$2.25

Ship Monday December 31st.
" Wednesday, January 2nd.

To:
Berwind-White Coal Co.
1 Broadway, N. Y. C.

Charge to Engineer. Ordered by Mr. Farley.
Terms: FOB Deld. Mine—30 days.

(Sgd.) M. Mirabella.

Important: Invoice with bill of lading must be mailed to us on day of shipment. All invoices dated from the 10th to the 25th, inclusive are payable first of month; all from 26th to 9th, inclusive, payable 15th of month, less 2 per cent discount provided articles have been received. No charge for packages or drayage will be allowed. Freight and shipping charges must be prepaid on all goods purchased delivered. This company will not be responsible for goods furnished without an order from our Purchasing Agent.

Copy

[fol. 187] EXHIBIT 26

Copy

December 27, 1934.

Austin, Nichols & Co., Inc.,
Kent Ave. N. 3rd St. and E. River,
Brooklyn, N. Y.

GENTLEMEN:

We thank you for your Order 1810M, dated December 26th for two (2) cars of C R/M Coal, shipment 1 car each on December 31st and January 2nd, which will receive our careful attention.

Price—$2.25 net ton mines.

Yours very truly, The Berwind-White Coal Mining Company, (Sgd.) W. L. Lane.

Copy

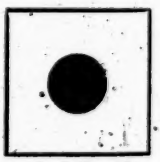
[fol. 188] EXHIBIT 27

Form No. 129.

Berwind's U. S. Atlantic Ports Coaling Contract

Berwind Coal

THE BERWIND-WHITE COAL MINING CO.
One Broadway
New York
Cable Address—"Berwind", New York



Berwind Service

Memorandum of Agreement

Entered into this 25th day of Nov., 1933 between The Berwind-White Coal Mining Co. (hereinafter called Suppliers), as Principals or Agents of the one part and

All America Cables, Inc.,
67 Broad Street,
New York City

(hereinafter called the Owners), of the other part.

1. The Suppliers agree to supply at the undermentioned Ports, subject in each case to a written order being placed

by the Captain in his capacity as such, and the Owners bind themselves to purchase, all the Bunker Coal normally required for the use of the steamers of which they are the owners, charterers or time-charterers, or in which they are otherwise interested, with coaling falling under their control.

2. New York $5.35 per gross ton, delivered alongside steamer at her dock within harbor limits, minimum quantity 250 tons. The coal to be Berwind's Standard Eureka.

3. Philadelphia $4.65 per gross ton, f.o.b. cars at railroad pier, subject to permission from the Railroad Company to bunker steamers alongside their coal pier.
[fol. 189] If delivery ex lighter is necessary, same to be according to the custom of the Port and extra costs for delivery ex lighter to be for account of Owners.
The coal to be Berwind's Standard Eureka.

4. Baltimore $4.60 per gross ton, f. o. b. cars at railroad pier, subject to permission from the Railroad Company to bunker steamers alongside their coal pier.
If delivery ex lighter is necessary, same to be according to the custom of the Port and extra costs for delivery ex lighter to be for account of Owners.
The coal to be Berwind's Standard Eureka.

5. Boston Current Price on date of delivery, the coal to be either Berwind's Standard New River or Berwind's Standard Pocahontas, Suppliers' option.

6. Newport News or Norfolk, (Suppliers' Option) $4.50 per gross ton, f. o. b. cars at railroad pier. The coal to be Berwind's Standard New River at Newport News and Berwind's Standard Pocahontas at Norfolk.

7. Should the Suppliers contract with any other steamship line at a lower price than that mentioned for any of the respective ports during the period of this contract, Owners are to receive the benefit of such reduction.

8. Payment for coals and/or disbursements and/or services rendered to be at Suppliers' option, in Cash before delivery, or as may be determined in agreement with Owners, or by honor of Captain's draft on Owners at not exceeding 30 days' sight, payable in New York, which draft the owner shall be bound to accept and pay at maturity, without right [fol. 190] of set-off or counterclaim. In the event of failure

to accept and/or pay any invoice and/or draft presented or drawn under this or any agreement between Owners and the Suppliers, this and all similar agreements with The Berwind-White Coal Mining Co., as Principals or Agents, shall be subject to cancelment forthwith by The Berwind-White Coal Mining Co.

9. Prices mentioned herein are subject to any increase or decrease in Railway rates, or mining costs including adjustments in wages; also to any conditions or regulations, or any direct taxes which may be imposed, by the Federal or State Governments.

10. It is further understood that in the event of War, Strikes, Riots, Lockouts, Interruptions of Transportation, whether general or partial, or other causes beyond Suppliers' control, affecting the normal working of this contract; the Suppliers, during the continuance of such events, and for so long as any such events affect the working of this contract, are to be relieved from all obligation under the contract, unless changed by mutual agreement.

11. This Contract shall remain in force from January 1st, or from date of signature if later, until December 31st, 1934.

The Berwind-White Coal Mining Co., (Sgd.) Geo. McCree, Assistant Manager, Foreign Department.

Accepted: All America Cables, Inc., (Sgd.) John K. Roosevelt, Vice-President.

[fol. 191] EXHIBITS 28-38

These exhibits are omitted. (See stipulation at page 195 hereof.) They are contracts between petitioner and the companies listed below, similar to the contract printed as Exhibit 27 at page 188 hereof, but covering the following periods:

Exhibit No.	Company	Period Covered
28	All America Cables, Inc	1/1/35—12/31/35
29	Clyde-Mallory Lines	1/1/34—12/31/34
30	Clyde-Mallory Lines	1/1/35—12/31/35
31	Compagnie Generale Transatlantique (French Line).	1/1/34—12/31/34
32	Compagnie Generale Transatlantique (French Line).	1/1/35—12/31/35
33	International Mercantile Marine Company	1/1/34—12/31/34
34	International Mercantile Marine Company	1/1/35—12/31/35
35	New York & Porto Rico Steamship Co	1/1/34—12/31/34
36	New York & Porto Rico Steamship Co	1/1/35—12/31/35
37	Compania Transatlantica (Spanish line)	1/1/34—12/31/34
38	Compania Transatlantica (Spanish line)	1/1/35—12/31/35

EXHIBIT 39

Ocean Dominion Steamship Corporation,
17 Battery Place, New York

March 5, 1934.

Berwind-White Coal Mining Company,
1 Broadway, New York City.

Attention Mr. A. Cory Davies

GENTLEMEN:

We confirm herewith our verbal agreement with regard to United States and West Indies bunkers, as follows:

[fol. 192] U. S. Bunkers—At Hampton Roads, New York, Philadelphia, Baltimore and Boston you agree to supply our bunker requirements at the best prices and terms available to other steamship operators under annual contract or otherwise, and we agree to take all our bunkers from you at Hampton Roads, except in cases where we are required to take bunkers from other suppliers under coal charters. And at the other U. S. ports mentioned, we agree to purchase our requirements from your insofar as quality, price and conditions can be met by you.

West Indies Bunkers—We will so far as possible confine our purchasers of bunkers in the West Indies to Port of Spain, Trinidad, and will purchase all our bunkers at that port from you or your subsidiary. The price y. i. b. is to be 2/6 over and above your c. i. f. cost of importation, but we are to have the privilege of purchasing our coal from you at Hampton Roads, Transporting it to Trinidad in our own vessels and having it received and stored by you under the arrangement formerly existing, your charge for discharging the vessels, etc. to be as formerly.

The above arrangement shall continue until December 31, 1934 and thereafter it shall continue automatically unless canceled by either party by the giving of ninety (90) days' written notice to the other.

I am writing this letter in duplicate and if it agrees with your ideas please sign both copies and return one for our office files.

Yours very truly, Ocean Dominion Steamship Corporation (Sgd.) Harmon Lewis, President.

Accepted: Berwind-White Coal Mining Company (Sdg.) A. Cory Davies.

[fol. 193] EXHIBIT 40

The Pennsylvania Railroad — Delivery Receipt

A. D. 5320-D

Received from The Pennsylvania Railroad Company in good condition the articles described below:

Waybill No. 3908 Date 1/4/35 Lading B Coal Size

From Eureka Coll 35 PA Foreign Billing reference L or F

Shipped Berwind White Coal Mining Co. Commodity Number

Consignee Berwind White Coal Mining Co. Weight of Car and Contents Tons

Classification Davy Capacity of car lbs.

Freight paid by

Car 20M 11x4 1/4 F 10 15 34

Initials BWCX Number 1651

Date Loaded

Transferred to Car No.

At Date

To Harsimus Cove Coal Pier NJ

Via

Destination

Via

Waybill Made at } Juniata Scales Pa.

Date of Received	Gross Weight	Tare Weight	Net Weight	Waybill Weight	Pounds
Report			104600		

Tariff Authority	Rate and Divisions	Freight Charges	Advances	Pre-paid
	272-G—	127 01		127 01

Consignee

[fol. 194]

EXHIBIT 41

Form 93.10M 5-34 E Demurrage at the Risk and Expense of Consignee

Eureka Pier
Harsimus, Jersey City, N. J.
The Berwind White Coal Mining Co.
Miners and shippers of the
Eureka Bituminous Coals
Commercial Trust Building
Philadelphia
1 Broadway, New York
80 Federal St.
Boston

No. 184 Shipped in good order and condition by The Berwind White Coal Mining Co. on board the Boat called the Eureka #105 of .....
whereof ..... is Master for this present Voyage, and now lying at the port of Jersey City, N. J., and bound for .....

Hudson Avenue, Brooklyn, N. Y.

Fourteen Hundred and Nine One Tons of 2240 pounds Berwind's Eureka R/M Coal
which I promise to deliver at the aforesaid Port of New York in like good order (the dangers of the Seas only excepted) unto Brooklyn Edison Co. Inc. or Their Assigns, he or they paying freight for the same at the rate of Agreed per ton.

In witness whereof the Master or Purser of the said Vessel hath affirmed to 5 Bills of Lading all of this tenor and date one of which being accomplished, the other to stand void.

Dated Jersey City N. J. 30 day of Jan. 1935.

1491 Tons

Joseph Cagne Master

Jersey City, N. J. 1 mo. 30 1935

Received on account of freight within cargo

Two Hundred Thirty Eight 56 Dollars 100

$238.56 100

Master

For additional advances see other side.

10—475

145

[fol. 195] IN SUPREME COURT OF NEW YORK.

Appellate Division—First Department

[Title omitted]

STIPULATION RE EXHIBITS OMITTED

It is hereby stipulated and agreed by and between the attorneys for the respective parties hereto, that copies of the taxpayer's above mentioned Exhibits 1, 11, 13, 14, 15, 16, 18, 20, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37 and 38, which have been omitted from this record, may be handed up to the Court at the argument by either party hereto; that such Exhibits may be referred to by either party hereto in his argument or briefs in the same manner and with the same force and effect as though such Exhibits were printed in full herein; and that the statements hereinbefore made, that each of Exhibits 11, 13, 14, 15, 16, 18, 20, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37 and 38 is a contract similar to a certain other [fol. 196] contract printed in full herein as an exhibit, are true and correct.

Exhibit 1 is a power of attorney executed by the petitioner authorizing Edward S. S. Sunderland, Marion N. Fisher and Marvin Lyons to represent it before the New York City Department of Finance and to act for it in all matters relating to its asserted liability for New York City local taxes for the period from December 10, 1934, to December 31, 1935, inclusive. The other omitted exhibits are contracts between the petitioner and the companies listed below covering the periods listed below:

Exhibit No.	Company	Period Covered
11	Interborough Rapid Transit Company, Thomas E. Murray, Jr., Receiver	4/ 1/35- 3/31/36
13	The New York Edison Company	4/ 1/35- 6/16/35
14	The New York Edison Company	6/17/35- 3/31/36
15	The United Electric Light and Power Company	4/ 1/35- 6/16/35
16	The United Electric Light and Power Company	6/17/35- 3/31/36
18	Brooklyn Edison Company, Inc	4/ 1/35- 3/31/36
20	Williamsburgh Power Plant Corporation of Brooklyn, New York	6/ 1/35- 5/31/36
28	All America Cables, Inc	1/ 1/35-12/31/35
29	Clyde-Mallory Lines	1/ 1/34-12/31/34
30	Clyde-Mallory Lines	1/ 1/35-12/31/35
31	Compagnie Generale Transatlantique, Paris	1/ 1/34-12/31/34
32	Compagnie Generale Transatlantique, Paris	1/ 1/35-12/31/35

[fol. 197]
Exhibit

No.	Company	Period Covered
33	International Mercantile Marine Company	1/ 1/34-12/31/34
34	International Mercantile Marine Company	1/ 1/35-12/31/35
35	New York & Porto Rico Steamship Co	1/ 1/34-12/31/34
36	New York & Porto Rico Steamship Co	1/ 1/35-12/31/35
37	Compania Transatlantica, Barcelona	1/ 1/34-12/31/34
38	Compania Transatlantica, Barcelona	1/ 1/35-12/31/35

Dated, New York, N. Y., September 9, 1938.

Davis Polk Wardwell Gardiner & Reed,
Davis Polk Wardwell Gardiner & Reed,
Attorneys for Petitioner.

P B William C. Chanler,

William C. Chanler,
Corporation Counsel
Attorney for Respondent.

So ordered.
E. J. G.

[fol. 198] Document 4, Annexed to Return

This document is printed as Exhibit III annexed to Petition at page 29 hereof.

Document 5, Annexed to Return

This document is printed as Exhibit IV annexed to Petition at page 32 hereof.

Document 6, Annexed to Return

This document is printed as Exhibit V, annexed to Petition at page 34 hereof.

[fols. 199-200] In Supreme Court of New York

Waiver of Certification

It is hereby stipulated pursuant to Section 170 of the Civil Practice Act that the papers hereinbefore printed consist of true and correct copies of the order of certiorari, the petition and the respondent's return thereto, together with all the exhibits annexed to the petition and certain of the documents annexed to the return, upon which the respondent acted in making the determination sought to be reversed herein, and now on file in the office of the Clerk

of the County of New York; that certification thereof pursuant to Section 616 of the Civil Practice Act is hereby waived; and that the foregoing record may be filed in the office of the Clerk of the Appellate Division, First Department as and for the record on certiorari herein.

Dated New York, N. Y., September 15, 1938.

Davis, Polk, Wardwell, Gardiner & Reed, Attorneys for Petitioner. William C. Chanler, Corporation Counsel, Attorney for Respondent.

[fol. 201] In Supreme Court of New York, New York County

[Title omitted]

Notice of Appeal to the Court of Appeals

Sirs:

Please take notice that the respondent hereby appeals to the Court of Appeals from the order of the Appellate Division of the Supreme Court, First Department, dated the 16th day of December, 1938 and entered in the office of the Clerk of said Appellate Division on or about the 27th day of December, 1938, which order, among other things, sustains the order of certiorari and annuls the determination of the respondent herein, and the respondent appeals from each and every part of said Appellate Division order as well as from the whole thereof.

Dated, January 20, 1939.

[fol. 202] Yours etc., William C. Chanler, Corporation Counsel, Attorney for Respondent, Office and Post Office Address: Municipal Building, Borough of Manhattan, New York City.

To Davis, Polk, Wardwell, Gardiner & Reed, Esqs., Attorneys for Petitioner, 15 Broad Street, Borough of Manhattan, New York City. Archibald R. Watson, Esq., Clerk of New York County.

[fol. 203] In Supreme Court of New York, Appellate Division

Present: Hon. Francis Martin, Presiding Justice; Hon. Edward J. Glennon, Hon. Irwin Untermyer, Hon. Edward S. Dore, Hon. Joseph M. Callahan, Justices.

In the Matter of the Application of

The Berwind-White Coal Mining Company, Petitioner,

against

Joseph D. McGoldrick, as Comptroller of the City of New York, Respondent

Order—Dec. 16, 1938

The above-named petitioner, The Berwind-White Coal Mining Company, having obtained an order of certiorari issued July 22, 1937 to review a final determination of the [fol. 204] Comptroller of the City of New York, in assessing against the petitioner a deficiency in New York City Sales Taxes of $176,703.89, consisting of $140,517.97 taxes and $36,185.92 penalties, under Local Law No. 20 of 1934 of the City of New York, as amended, for the period from December 10, 1934, to December 31, 1935, and said proceeding having come on to be heard before this Court on November 4, 1938, and having heard Davis, Polk, Wardwell, Gardiner & Reed by Marvin Lyons, of counsel, appearing on behalf of the petitioner, and William C. Chanler, by Milton Sandberg of counsel, appearing on behalf of the respondent, and due deliberation having been had thereon, it is hereby

Ordered that the order of certiorari be and the same hereby is sustained and that the determination of the Comptroller in assessing the tax and penalties above described in the amount of $176,703.89 be and the same hereby is annulled, with $50 costs and disbursements to the petitioner; and it is further

Ordered that the respondent refund to the petitioner the sum of $176,703.89, with interest thereon at 6% per annum from July 19, 1937.

Enter,

F. M.

[fol. 205] IN SUPREME COURT OF NEW YORK, APPELLATE DIVISION

OPINION

(Reported 100 New York Law Journal 2195 on December 17, 1938)

Determination of the Comptroller, that the petitioner, The Berwind-White Coal Mining Company, is liable for a sales tax deficiency unanimously annulled, with $50 costs and disbursements to the petitioner, on the Authority of Matter of National Cash Register Co. v. Taylor (276 N. Y. 208), Matter of Compagnie Generale Transatlantique v. Taylor (279 N. Y. 192), decided November 29, 1938). The Comptroller is directed to make refund to petitioner of the tax and penalties paid, with interest thereon from the date of payment. Settle order on notice.

[fol. 206] WAIVER OF CERTIFICATION

It is hereby stipulated that the foregoing are correct copies of the notice of appeal to the Court of Appeals, the order and the opinion of the Appellate Division and all papers upon which said order are founded, all of which are now on file in the office of the Clerk of the County of New York; and certification thereof pursuant to Sections 170 and 616 of the Civil Practice Act or otherwise is hereby waived.

Dated New York, February 21, 1939.

William C. Chanler, Corporation Counsel, Attorney for Defendant-Appellant. Davis, Polk, Wardwell, Gardiner & Reed, Attorneys for Petitioner-Respondent.

[fol. 207] At a Special Term, Part II, of the Supreme Court of the State of New York, held in and for the County of New York, at the Courthouse thereof, in the Borough of Manhattan, City of New York, N. Y., on the 23rd day of June, 1939.

Present: Honorable John F. Carew, Justice.

In the Matter of the Application of THE BERWIND-WHITE COAL MINING COMPANY, Petitioner,

for a Certiorari Order against

JOSEPH D. McGOLDRICK, as Comptroller of the City of New New York, Respondent

ORDER ON REMITTITUR

The above named respondent, Joseph D. McGoldrick, as Comptroller of the City of New York, having appealed to the Court of Appeals of the State of New York from each and every part of the order of the Appellate Division of the Supreme Court, First Judicial Department, dated the 16th day of December, 1938, and entered in the office of the Clerk of said Appellate Division on or about the 27th day of December, 1938, which order sustains the order of certiorari, annuls the determination of the Comptroller, with $50 costs and disbursements to the petitioner, and orders the respondent herein to refund to the petitioner the sum of $176,703.89, with interest thereon at 6% per annum from July 19, 1937, [fol. 208] and the said appeal having been duly argued in the Court of Appeals, and the said Court of Appeals having ordered and adjudged on the 21st day of June, 1939, that the said order of the Appellate Division of the Supreme Court, First Judicial Department, be affirmed with costs, and a certified copy of the order of the said Court of Appeals having been duly filed in the office of the Clerk of the County of New York,

Now, on motion of Davis, Polk, Wardwell, Gardiner & Reed, attorneys for the petitioner, it is

Ordered, Adjudged and Decreed that the said order of the Court of Appeals be and it hereby is made the order of this Court, and the Clerk is hereby directed to enter judgment accordingly.

Enter, J. F. C., J. S. C.

[fol. 209] SUPREME COURT OF THE STATE OF NEW YORK,
COUNTY OF NEW YORK

In the Matter of the Application of THE BERWIND-WHITE COAL MINING COMPANY, Petitioner,

for a Certiorari Order against

JOSEPH D. McGOLDRICK, as Comptroller of the City of New New York, Respondent

JUDGMENT OF AFFIRMANCE

The above named respondent, Joseph D. McGoldrick, as Comptroller of the City of New York, having appealed to the Court of Appeals of the State of New York from each and every part of the order of the Appellate Division of the Supreme Court, First Judicial Department, dated the 16th day of December, 1938, and entered in the office of the Clerk of said Appellate Division on or about the 27th day of December, 1938, which order sustains the order of certiorari, annuls the determination of the Comptroller, with $50 costs and disbursements to the petitioner, and orders the respondent herein to refund to the petitioner the sum of $176,703.89, with interest thereon at 6% per annum from July 19, 1937, and the said Court of Appeals having on the 21st day of June, 1939, ordered and adjudged that the said order of the Appellate Division of the Supreme Court, First Judicial Department, be affirmed with costs, and a certified copy of the order of the said Court of Appeals having been duly filed [fol. 210] in the office of the Clerk of the County of New York, and an order having been entered herein on the day of June, 1939, making the said order of the Court of Appeals an order of this Court, and said costs having been duly taxed by the Clerk of this Court, it is, on motion of Davis, Polk, Wardwell, Gardiner & Reed, attorneys for the petitioner,

Adjudged that the order of the Appellate Division of the Supreme Court, First Judicial Department, dated the 16th day of December, 1938, and entered in the office of the Clerk of the said Appellate Division on or about the 27th day of December, 1938, ordering that the order of certiorari be sustained and that the determination of the Comptroller in assessing the tax and penalties described in the said order of the said Appellate Division in the amount of $176,703.89 be annulled, with $50 costs and disbursements to the petitioner, and that the respondent refund to the

petitioner the sum of $176,703.89, with interest thereon at 6% per annum from July 19, 1937, be and the same hereby is in all respects affirmed, and it is further

Adjudged that the petitioner, The Berwind-White Coal Mining Company, whose address is No. 1 Broadway, New York, N. Y., recover of the respondent, Joseph D. McGoldrick, as Comptroller of the City of New York, whose address is the Municipal Building of the City of New York, Borough of Manhattan, City of New York, N. Y., the sum of $159.06 dollars costs and disbursements, and that the said petitioner have execution therefor.

Dated, New York, N. Y., June 24th, 1939.

Archibald R. Watson, Clerk.

[fol. 211] Supreme Court, New York County

In the Matter of the Application of The Berwind-White Coal Mining Company, Petitioner-Respondent,

for a certiorari order against

Joseph D. McGoldrick, as Comptroller of the City of New York, Defendant-Appellant

State of New York,
County of New York,

John A. Leddy, being duly sworn, says that he is the Assistant Chief Clerk in the office of the Corporation Counsel of the City of New York, the attorney for the defendant-appellant in the above cause.

Deponent says that no opinion was written or handed down by the Court of Appeals in deciding the appeal in this cause.

John A. Leddy.

Sworn to before me, this 11th day of October, 1939.
Frank Surowitz, Notary Public, Bronx County.

Bronx Co. Clks. No. 207, Reg. No. 18284.
Kings Co. Clks. No. 324, Reg. No. 621.
N. Y. Co. Clks. No. 930, Reg. No. 08639.
Queens Co. Clks. No. 557, Reg. No. 253.
Commission Expires March 30, 1940.

[fol. 212] [Reg. 227. Fol. 229]

(27165)

COURT OF APPEALS, STATE OF NEW YORK

No. 1506

In the Matter of the Application of BERWIND-WHITE COAL MINING COMPANY, Petitioner-Respondent,

for an order of certiorari against

JOSEPH D. McGOLDRICK, Comptroller of the City of New York, Defendant-Appellant

NOTICE OF MOTION TO AMEND THE REMITTITUR OF THIS COURT, OR FOR ALTERNATIVE RELIEF, WITH SUPPORTING AFFIDAVIT

Dated, New York, N. Y., September 20, 1939.
William C. Chanler, Corporation Counsel, Attorney for Defendant-Appellant.

William C. Chanler, Sol Charles Levine, Milton Sandberg, of Counsel.

[fol. 213] COURT OF APPEALS, STATE OF NEW YORK

In the Matter of the Application of BERWIND-WHITE COAL MINING COMPANY, Petitioner-Respondent

for an order of certiorari against

JOSEPH D. McGOLDRICK, Comptroller of the City of New York, Defendant-Appellant

NOTICE OF MOTION

SIRS:

Please take notice that upon the annexed affidavit of William C. Chanler, verified the 20th day of September, 1939, the papers on appeal, and all the proceedings heretofore had herein, the undersigned will move this Court at a session thereof to be held at the Court of Appeals Hall, Albany, New York, on Monday, the 25th day of September, 1939, at 2 o'clock in the afternoon of that day, or as soon thereafter as counsel can be heard, for an order

(a) recalling the remittitur herein;

(b) granting reargument of the appeal herein, and upon such reargument being granted, reversing the order appealed from;

[fol. 214] (c) or, in the alternative, in the event the order appealed from be not reversed, amending the remittitur of this Court, dated June 21, 1939, by inserting after the words "be and the same hereby is affirmed with costs," the words, "upon the sole ground that the City sales tax law as here applied violates the Commerce Clause (Art. I, sec. 8, cl. 3) of the Constitution of the United States";

and for such other and further relief as to the Court may seem just and proper.

Dated, New York, N. Y., September 20, 1939.

Yours, etc., William C. Chanler, Corporation Counsel of the City of New York, Attorney for Defendant-Appellant, Office & P. O. Address, Municipal Building, Borough of Manhattan, City of New York.

To: Davis, Polk, Wardwell, Gardiner & Reed, Esqs., Attorneys for Petitioner-Respondent, 15 Broad Street, Borough of Manhattan, New York City, N. Y.

John Ludden, Esq., Clerk of the Court of Appeals.

[fol. 215] AFFIDAVIT IN SUPPORT OF MOTION

COURT OF APPEALS, STATE OF NEW YORK

In the Matter of the Application of BERWIND-WHITE COAL MINING COMPANY, Petitioner-Respondent,

for an order of certiorari against

JOSEPH D. McGOLDRICK, Comptroller of the City of New York, Defendant-Appellant

STATE OF NEW YORK,
County of New York, ss:

William C. Chanler, being duly sworn, deposes and says:

1. I am Corporation Counsel of the City of New York, and am familiar with the proceedings in this case.

2. The within appeal involved the validity under the Commerce Clause of the Federal Constitution of the New York

City sales tax, imposed by Local Law No. 20 of 1934, as amended, as applied to respondent's sales in New York City of coal shipped from its mines in Pennsylvania.

[fol. 216] 3. On June 21, 1939, this Court affirmed without opinion the order of the Appellate Division, First Department, which invalidated the City sales tax as applied to these sales, on the ground that it constituted a burden on interstate commerce (281 N. Y., mem. p. 34). The remittitur affirming the order of the Appellate Division, First Department, directed that judgment be entered in accordance with this Court's opinion; and such judgment was entered on June 24, 1939.

4. The appellant desires to apply to the Supreme Court of the United States for a writ of certiorari to review this Court's decision. By order of Mr. Justice Reed, dated September 7, 1939, the City's time to file with the United States Supreme Court a petition for certiorari was extended for a period of 30 days from September 24, 1939.

5. On June 5, 1939, the Supreme Court of the United States granted the request of this appellant that writs of certiorari be issued to review previous decisions of this Court in connection with the validity of the New York City sales tax under the Commerce Clause in Matter of Compagnie Générale Transatlantique v. McGoldrick, 279 N. Y. 192 (1938), certiorari granted 307 U. S. —, and in Matter of Felt & Tarrant Mfg. Co. v. McGoldrick, 279 N. Y. 678 (1938), certiorari granted 307 U. S. —. These cases are now pending on the docket of the United States Supreme Court.

6. Prior to that date this appellant had requested this Court to amend the remittiturs in those two proceedings to [fol. 217] make it clear that the decision in favor of the taxpayer was based solely on the ground that the Federal Constitution had been contravened; and this Court had granted such request, inserting in each case the words "upon the sole ground that the City Sales Tax Law as here applied violates the commerce clause (article 1, section 8, clause 3) of the Constitution of the United States" (280 N. Y. 688, 691).

7. In the two earlier cases of Matter of National Cash Register Co. v. Taylor, 276 N. Y. 208 and Matter of West Publishing Company v. Taylor, 276 N. Y. 535, the petition

of the City for certiorari was denied (303 U. S. 656 [1938]). It is likely that the denial in those cases was based on the Supreme Court's view that they did not present an exclusively federal question. At least one commentator has taken this position and has stated that certiorari was denied in those cases because of the existence of a state question under the state enabling act. Lockhart, The Sales Tax in Interstate Commerce, 52 Harvard Law Review, 617, 619, note 14 (1939). The granting of certiorari in the French Line and Felt & Tarrant cases after this Court had amended the remittitur lends support to this view.

8. It is extremely important to the appellant that there be no doubt on the part of the Supreme Court that the case at bar was decided upon exclusively federal grounds. This case involves not only question of great public importance but also the substantial sum of $176,703.89. Unless the way is left open for the granting of certiorari in this case, the City may be in the position of prevailing over the French [fol. 218] Line and Felt & Tarrant companies in the United States Supreme Court, yet left without redress against the similarly situated taxpayer here.

9. There is no difference between this case and the French Line and Felt & Tarrant cases in respect to the existence of an enabling act, or other state question. In those cases, this Court amended the remittitur so as to show that an exclusively federal question was the basis of its decision.

The citation by the Appellate Division (255 App. Div. 961) of the National Cash Register case possibly suggests that it had in mind a state question, which had been discussed in its opinion in that case (252 App. Div. 90). As this Court, in affirming, wrote no opinion, it would seem incumbent upon us to move to eliminate any such suggestion by the amendment of the remittitur.

Wherefore, your deponent prays that reargument be granted, and upon such reargument, that the order appealed from be reversed; or, in the alternative, that the remittitur and opinion be amended to show that the decision raised a federal question under the Commerce Clause, and no other questions.

William C. Chanler.

Sworn to before me this 20th day of September, 1939.
Daniel W. Kingston, Notary Public, Kings County.

N. Y. Co. Clerk's No. 104, Reg. No. 0-K-64.
Bronx Co. Clerk's No. 3, Reg. No. 5-K-40.
Kings Co. Clerk's No. 12, Reg. No. 117.
Queens Co. Clerk's No. 60, Reg. No. 636.
Certificate Filed in Richmond County.
Commission Expires March 30, 1940.

[fol. 219] STATE OF NEW YORK IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany, on the twenty-seventh day of September, A. D. 1939.

Present, Hon Frederick E. Crane, Chief Judge, Presiding.

In the Matter of The Application of BERWIND-WHITE COAL MINING COMPANY, Petitioner-Respondent,

For an Order of Certiorari vs.

JOSEPH D. McGOLDRICK, Comptroller of the City of New New York, Defendant-Appellant

A motion for a reargument of or to amend the remittitur in the above cause having been heretofore made upon the part of the defendant-appellant herein, papers having been duly submitted thereon and due deliberation thereupon had, it is

Ordered, that the said motion for reargument be and the same hereby is denied and the remittitur amended by adding after the words "be and the same hereby is affirmed with costs" the words "upon the sole ground that the City Sales Tax Law as here applied violates the Commerce Clause (Art 1, Sec. 8, Cl. 3) of the Constitution of the United States."

And the Supreme Court of the State of New York, County of New York, is hereby requested to direct its Clerk to return said remittitur to this Court for amendment accordingly.

A copy.

Rufus Kimball, Deputy Clerk. (Seal.)

[fol. 220] COURT OF APPEALS,
State of New York, ss:

Pleas in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 21st day of June in the year of our Lord one thousand nine hundred and thirty-nine, before the Judges of said Court.

Witness, The Hon. Frederick E. Crane, Chief Judge, Presiding.

John Ludden, Clerk.

Remittitur, June 21, 1939.

[fol. 221] In the Matter of the Application of THE BERWIND-WHITE COAL MINING COMPANY &c.

ag'st.

JOSEPH D. MCGOLDRICK, as Comptroller of The City of New York

Be It Remembered, That on the 4th day of April in the year of our Lord one thousand nine hundred and thirty-nine Joseph D. McGoldrick, as Comptroller of The City of New York the appellant in this cause, came here unto the Court of Appeals, by William C. Chanler, his attorney, and filed in the said Court a Notice of Appeals and return thereto from the order of the Appellate Division of the Supreme Court in and for the First Judicial Department. And The Berwind-White Coal Mining Company the respondent in said cause, afterwards appeared in said Court of Appeals by Davis, Polk, Wardwell, Gardiner & Reed, its attorneys.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, The said Court of Appeals having heard this cause argued by Mr. Marvin Lyons, of counsel for the respondent, and submitted by counsel for the appellant, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed with costs.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the said Supreme Court there to be proceeded upon according to law.

[fol. 222] And afterwards, to wit, on the 27th day of September 1939 an order was duly made amending the remittitur herein, a certified copy of which order is hereto attached and made a part hereof.

Therefore, it is considered that the said order be affirmed with costs, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court before the Justices thereof, &c.

John Ludden, Clerk of the Court of Appeals of the State of New York.

COURT OF APPEALS, CLERK'S OFFICE,
Albany, June 21, 1939.

I hereby Certify, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

John Ludden, Clerk. (Seal.)

[fol. 223] At a Special Term, Part II of the Supreme Court, held in and for the County of New York, at the New County Court House in the Borough of Manhattan, City of New York, on the 11th day of October, 1939.

Present: Hon. Julius Miller, Justice.

In the Matter of the Application of THE BERWIND-WHITE COAL MINING COMPANY, Petitioner-Respondent,

For a Certiorari Order against

JOSEPH D. MCGOLDRICK, as Comptroller of the City of New York, Defendant-Appellant

The defendant-appellant having moved at the Court of Appeals for a reargument of the appeal herein or to amend the remittitur of the Court of Appeals in the above cause, and the Court of Appeals, in an order dated the 27th day

of September, 1939, having ordered that the said motion for reargument be denied and that the remittitur be amended by adding after the words "be and the same hereby is affirmed with costs" the words "upon the sole ground that the City Sales Tax Law as here applied violates the Commerce Clause (Art 1, Sec. 8, Cl. 3) of the Constitution of the United States",

Now on motion of William C. Chanler, Corporation Counsel of the City of New York, attorney for the defendant-appellant, it is

[fol. 224] Ordered that the said order of the Court of Appeals amending the said remittitur be and the same hereby is made the order of this Court.

Enter, J. M., J. S. C.

[fol. 225] COURT OF APPEALS OF THE STATE OF NEW YORK

In the Matter of the Application of THE BERWIND-WHITE COAL MINING COMPANY, Petitioner-Respondent,

for a certiorari order against

JOSEPH D. McGOLDRICK, as Comptroller of the City of New York, Defendant-Appellant

I, Archibald R. Watson, Clerk of the Supreme Court of the State of New York, County of New York, and Clerk of the County of New York, do hereby certify that the foregoing consists of a true, full, correct and complete copy of the printed record on appeal to the Court of Appeals of the State of New York in the above entitled proceeding upon which the said Court of Appeals acted and which has been certified to this Court by the said Court of Appeals, and a true, full, correct and complete copy of the following papers, to wit: the order of the Supreme Court entered on the remittitur from the Court of Appeals; the judgment of the Supreme Court entered on the remittitur from the Court of Appeals; the affidavit of no opinion by the Court of Appeals; the notice of motion for reargument and to amend the remittitur of the Court of Appeals, with the supporting affidavit; the order of the Court of Appeals upon the granting of the motion to amend the remittitur; the amended remittitur from the Court of Appeals and the order of the Supreme Court making the order and amended

remittitur of the Court of Appeals the order of the Supreme Court, all of which are on file in this office.

In Witness Whereof I have hereunto set my hand and affixed my seal the 13th day of October, 1939.

Archibald R. Watson, Clerk. (Seal.)

[fol. 226] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1939

No. —

JOSEPH D. McGOLDRICK, Comptroller of the City of New York, Petitioner,

against

BERWIND-WHITE COAL MINING COMPANY

JOSEPH D. McGOLDRICK, Comptroller of the City of New York, Petitioner,

against

A. H. DuGRENIER, INC.

ORDER EXTENDING TIME WITHIN WHICH TO APPLY FOR WRITS OF CERTIORARI

On consideration of the motions of counsel for petitioner in the above-entitled causes, and good cause therefor having been shown,

It is Now Here Ordered that the time within which petitions for writs of certiorari may be filed herein be, and the same is hereby, extended for a period of 30 days from September 24, 1939.

Dated, this 7th day of September, 1939.

Stanley Reed, Associate Justice of the Supreme Court of the United States.

Endorsed on cover: File No. 43,882. New York, Supreme Court. Term No. 475. Joseph D. McGoldrick, Comptroller of the City of New York, petitioner, vs. Berwind-White Coal Mining Company. Petition for a writ of certiorari and exhibit thereto. Filed October 18, 1939. Term No. 475. O. T., 1939.

[fol. 227] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed December 4, 1939

The petition herein for a writ of certiorari to the Supreme Court of the State of New York is granted, and the case is assigned for argument immediately following No. 474.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Supreme Court of the United States

No. 475 October Term, 1939

JOSEPH D. McGOLDRICK, Comptroller of the City of New York,

Petitioner,

against

BERWIND-WHITE COAL MINING COMPANY.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, AND BRIEF IN SUPPORT THEREOF.

Application of Commerce Clause to consumers' sales tax on sales in New York City of coal shipped from sources of supply outside the State. Error of holding that tax is invalid where non-discriminatory, and possibility of multiple taxation is absent. Error of holding that coal purchases made in the city are in interstate commerce merely because seller for its own convenience, chooses to ship from outside the State. Holding of court below (1) discriminates against local business by giving unfair competitive advantage to sellers storing coal outside the State; and (2) seriously diminishes local tax revenues by creating extensive immunities and fostering tax avoidance and evasion. Conflict between decisions of State courts.

October 17, 1939.

WILLIAM C. CHANLER,
PAXTON BLAIR,
SOL CHARLES LEVINE,
Counsel for Petitioner,
Municipal Building,
Borough of Manhattan,
City of New York.

MILTON SANDBERG,
of Counsel.

INDEX

	PAGE
Petition:	
Jurisdiction and timeliness	2
Statute the validity of which is involved	4
Opinions Below	4
Summary statement of the matter involved	4
Questions presented	5
Assignment of errors	5
Reasons for allowance of writ	6
Brief:	
Statement of the case	9
Jurisdictional statement and assignment of errors	12
Preliminary Statement	12
Argument:	
1. The New York City sales tax, as applied to the respondent's sales, does not impose an unconstitutional burden on interstate commerce	13
There is no undue burden on interstate commerce	13
Comparable taxes have always been upheld	15
2. Respondent's sales do not require or necessarily involve interstate shipment, as that phrase is used in *Wiloil Corp.* v. *Pennsylvania*	18
Conclusion	20
Appendix A. Provisions of local law	21
Appendix B. Provisions of state enabling act	41
Appendix C. Memorandum Opinion of Appellate Division	44

Table of Cases Cited.

	PAGE
Banker Brothers v. Pennsylvania, 222 U. S. 210	6, 16, 18
Coverdale v. Arkansas-Louisiana Pipe Line Co., 303 U. S. 604	13
Edelman v. Boeing Air Transportation Co., 289 U. S. 249	16
Felt & Tarrant Mfg. Co. v. Gallagher, 306 U. S. 62	15, 16
Gregg Dyeing Co. v. Query, 286 U. S. 472	16
Gwin, White & Prince, Inc. v. Henneford, 305 U. S. 434	13, 14
Henneford v. Silas Mason Co., 300 U. S. 577	16
Hinson v. Lott, 8 Wall. 148	14, 16
J. Bacon & Sons v. Martin, 305 U. S. 380	14, 16
J. D. Adams Mfg. Co. v. Storen, 304 U. S. 307	13, 14
Lewis v. City of Bluefield, 117 W. Va. 782, 188 S. E. 237	7
Matter of A. H. DuGrenier, Inc. v. McGoldrick, 281 N. Y., mem. p. 32	2, 4
Matter of Compagnie Générale Transatlantique v. McGoldrick, 279 N. Y. 192	44
Matter of C. G. Gunther's Sons v. McGoldrick, 279 N. Y. 148	12
Matter of National Cash Register Co. v. Taylor, 276 N. Y. 208	44
McGoldrick v. Compagnie Générale Transatlantique, 307 U. S.	2, 6, 12
McGoldrick v. Felt & Tarrant Mfg. Co., 307 U. S.	2, 6, 12
Milk Control Board v. Eisenberg Farm Products, 306 U. S. 346	2
Minnesota v. Blasius, 290 U. S. 1	2
Menamotor Oil Co. v. Johnson, 292 U. S. 86	14, 15, 16
Moore v. N. Y. Cotton Exchange, 270 U. S. 593	19
Nashville, C. & St. L. Ry. v. Wallace, 288 U. S. 249	16
Pacific Telephone & Telegraph Co. v. Gallagher, 306 U. S. 182	16
Southern Pacific Company v. Gallagher, 306 U. S. 167	16, 17

PAGE

Ware & Leland v. Mobile County, 209 U. S. 405 19
Western Live Stock v. Bureau, 303 U. S. 250 ..... 13, 16
Wiloil Corporation v. Pennsylvania, 294 U. S. 169 ..... 5, 6, 14, 16, 18
Woodruff v. Parham, 8 Wall. 123 ..... 16, 19

Index of Statutes, Etc.

Civil Practice Act, Art. 78 3
Comptroller's Regulations, Art. 94 12
Harvard Law Rev. 16
Laws of California of 1935 16
Laws of California of 1937 16
Laws of New York of 1934, ch. 873 4
Local Law No. 20 of 1934 4
Local Law No. 24 of 1934 4
U. S. C. A., Title 28, § 344, subd. (b) 2, 8
U. S. Constitution, Commerce Clause 3

Supreme Court of the United States

No. . October Term, 1939

JOSEPH D. McGOLDRICK, Comptroller of the City of New York,
Petitioner,

against

BERWIND-WHITE COAL MINING COMPANY.

PETITION FOR WRIT OF CERTIORARI TO SUPREME COURT OF THE STATE OF NEW YORK.

To the Honorable the Supreme Court of the United States:

The petition of Joseph D. McGoldrick, Comptroller of the City of New York, respectfully shows:

1. Your petitioner is the Comptroller of the City of New York, charged by law with the duty of enforcing the tax laws here involved. In conformity with the law in New York, your petitioner was duly substituted, prior to the decision of the Court of Appeals sought to be reviewed, in place and stead of Frank J. Taylor, the former Comptroller, who made the original determination of tax liability against the taxpayer. The petition seeks review of a decision of the Court of Appeals of the State of New York (Judge FINCH dissenting), holding that by virtue of the Commerce Clause, the New York City sales tax could not be imposed upon respondent's sales of coal to New York City purchasers for consumption. The federal question was, and the Court so stated in its remittitur, the sole question involved in its decision.

2. The present case is a companion case to *Matter of A. H. DuGrenier, Inc.* v. *McGoldrick*, 281 N. Y., mem. p. 32

(1939), decided on the same date, where the tax was likewise invalidated. A petition for certiorari in that case is being presented together with the present petition.

3. This case involves the same question as is involved in *McGoldrick* v. *Compagnie Generale Transatlantique*, 307 U. S. ..... (June 5, 1939), and *McGoldrick* v. *Felt & Tarrant Mfg. Co.*, 307 U. S. ..... (June 5, 1939), in which writs of certiorari were granted by this Court on the application of this petitioner, and which are now Nos. 44 and 45 respectively on the current docket of this Court. On October 9, 1939, the Court granted the request of the City that the hearing of those cases be deferred until December 4 or such time as the petitions for certiorari in this case and the companion *DuGrenier* case shall have been acted upon.

Jurisdiction and Timeliness.

4. The petition for certiorari is made under 28 U. S. C. A., § 344, subd. (b); the Court has jurisdiction to grant the writ. *Minnesota* v. *Blasius*, 290 U. S. 1 (1933); *Milk Control Board* v. *Eisenberg Farm Products*, 306 U. S. 346 (1939); *McGoldrick* v. *Compagnie Generale Transatlantique* and *McGoldrick* v. *Felt & Tarrant Mfg. Co.*, both *supra*.

5. A final order and judgment were entered in the office of the County Clerk of New York County, on June 24, 1939, upon the remittitur of the Court of Appeals filed on June 23, 1939, and upon the order of the Supreme Court of the State of New York, dated June 23, 1939, making the order and judgment of the Court of Appeals the order of the Supreme Court. Thereafter, by order of Mr. Justice Reed, dated September 7, 1939, the petitioner's time to petition this Court for certiorari was extended for a period of thirty days from September 24, 1939. On September 25, 1939,

petitioner duly filed with the Court of Appeals a motion for reargument and to amend the remittitur. On September 27, 1939, the Court of Appeals denied the motion for reargument but granted the motion to amend the remittitur. 281 N. Y., mem. p. 94. On October 11, 1939, an order was entered in the office of the County Clerk of New York County, making the order of the Court of Appeals dated September 27, 1939, the order of the Supreme Court of the State of New York. The petition is timely, either by virtue of Mr. Justice REED's order of extension, or because of the decision on the motion for reargument, the amendment of the remittitur on September 27, 1939, and the resultant necessity of entering a new order in the Court where the record lies.

6. The decision of the Court of Appeals was based solely upon the ground that the tax as applied violated the Commerce Clause of the Federal Constitution. This ground of objection was raised by the taxpayer (respondent here) at the hearing before the petitioner to review petitioner's preliminary determination of tax liability (R. 40-140). Thereafter, it was again raised in the proceeding brought in the Appellate Division under Article 78 of the Civil Practice Act of the State of New York (R. 16). The Appellate Division sustained the objection and annulled petitioner's determination (R. 203). Upon appeal to the Court of Appeals the taxpayer further urged this objection. The remittitur, as amended, provides that the order of the Appellate Division appealed from was affirmed,

> "upon the sole ground that the City Sales Tax Law as here applied violates the Commerce Clause (Art. I, Sec. 8, cl. 3) of the Constitution of the United States." (281 N. Y., mem. p. 94.)

The Statute the Validity of Which Is Involved.

7. The statute the constitutionality of which is involved is the New York City sales tax law, Local Law No. 20 of 1934 (officially printed at p. 143 of the Local Laws of the Cities of the State for 1934 as No. 21), as amended by Local Law No. 24 of 1934 (officially printed at p. 164 of Local Laws of the Cities of the State for 1934 as No. 25), all enacted pursuant to authority conferred by Laws of New York of 1934, ch. 873, p. 1805. These local laws, and the enabling act authorizing them, have been and continue to be renewed annually. The provisions of the local law are printed as Appendix A, the provisions of the state enabling act, as Appendix B.

Opinions Below.

8. The decision of the Court of Appeals is reported in 281 N. Y., mem. p. 34, the memorandum opinion of the Appellate Division is reported in 255 App. Div. 961, and is printed as Appendix C. The decision of the Court of Appeals in the companion *DuGrenier* case is in 281 N. Y., mem. p. 32, which affirmed 255 App. Div. 961.

Summary Statement of the Matter Involved.

9. The City sales tax law in question imposes a non-discriminatory tax of 2% upon every sale of tangible personal property in the City of New York, the tax being paid and borne by the purchaser. A sale is defined as "any transfer of title or possession or both"; a retail sale as, a sale "for any purpose other than for resale". The respondent's sales which were the subject of the tax were made in a manner described more fully in the subjoined

brief. The contracts were made, signed and executed within the City of New York and called for the sale and delivery of coal in New York City. Respondent fulfilled these contracts by shipments from its mines in Pennsylvania.

Questions Presented.

10. The questions presented in this case are as follows:

(a) Does the New York City tax as applied to respondent's sales of coal impose an unconstitutional burden on interstate commerce?

(b) Do respondent's sales of coal "require or necessarily involve transportation across the state boundary" in the sense in which those words were used in *Wiloil Corp.* v. *Pennsylvania,* 294 U. S. 169, 174 (1935)?

Assignment of Errors.

11. It is submitted that the Court of Appeals erred:

(a) In holding that the New York City sales tax as applied to the respondent's sales constituted an unconstitutional burden on interstate commerce.

(b) In holding that the sales which were the subject of the tax were contracts for interstate shipments, or otherwise required or necessarily involved interstate commerce, giving in so holding an erroneous interpretation of the *Wiloil* case, *supra.*

(c) In regarding itself as compelled by the Commerce Clause to affirm the determination of the Appellate Division, and annul petitioner's determination of tax liability.

Reasons for Allowance of the Writ.

12. The reasons relied on by petitioner for allowance of the writ are as follows:

(a) This case involves a slight variation on the question involved in the *Compagnie Générale Transatlantique* and *Felt & Tarrant Mfg. Co.* cases which are now pending before this Court. The same reasons which justified the request for a writ of certiorari in those cases justify the request in this case; and it is a matter of great public importance to the City of New York that this case be heard together with the pending cases.

(b) Petitioner contends that in holding that the City sales tax law as applied to respondent's sales constitutes an unconstitutional burden on interstate commerce the Court of Appeals has decided a federal question of substance in a way probably not in accord with the applicable decisions of this Court, which we cite in the subjoined brief; for, the Court has held invalid a type of local consumers' tax which (i) does not discriminate against or otherwise burden interstate commerce, and (ii) is so limited in its operation that there is no possibility of multiple taxation.

(c) Petitioner suggests that in holding that the particular transactions taxed required or necessarily involved interstate commerce, the Court of Appeals has decided a second federal question of substance in a way probably not in accord with applicable decisions of this Court: *Wiloil Corporation* v. *Pennsylvania*, 294 U. S. 169 (1935); *Banker Brothers* v. *Pennsylvania*, 222 U. S. 210 (1911).

(d) These are test cases. A great many proceedings are pending which await their final outcome. Large numbers

of purchasers and sellers and sums of money running into millions of dollars annually are involved. In New York City, in particular, a huge business is done every year in a manner similar to that here described, for a large number of purchasers in the City of New York place orders which, by reason of the seller's own choice or convenience, are filled from out-of-state sources.

(e) The decision of the Court of Appeals unduly limits the taxing powers of the States, and does so in such a way as to give industries a motive for moving their plants or warehouses out of the State while maintaining selling offices within the State. By thus causing a loss of wealth and employment to the State, it will bring about a shrinkage of revenue from other taxes.

The Commerce Clause should not be twisted into a device to prejudice local vendors by subjecting them to unjustifiable competitive disadvantage in their appeal to the same local market. A considerable number of states and localities are imposing consumers' taxes like the New York City sales tax here involved, and are undoubtedly confronted with precisely the same question under the Commerce Clause.

(f) The decision of the Court of Appeals that respondent's sales taxed are in interstate commerce, conflicts with the decision of the highest court of the State of West Virginia where a similar question was raised and decided. *Lewis* v. *City of Bluefield*, 117 W. Va. 782, 188 S. E. 237 (1936).

WHEREFORE, petitioner prays that a writ of certiorari may be issued out of and under the seal of this Court, directed to the Supreme Court of the State of New York,

in and for the County of New York, commanding that Court to certify and send to this Court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the said Court in this cause, to the end that the case may be reviewed and determined in this Court, as provided in 28 U. S. C. A., § 344, subd. (b); and that the final order and judgment of the said Court, and every part thereof, may be reviewed and corrected by this Court in conformity with the Constitution and laws of the United States; and that the said final order and judgment may be reversed and petitioner's original determination of tax liability on the part of the respondent confirmed; and petitioner prays for such other and further relief as to this Court may seem just and proper; and petitioner will ever pray.

Dated: New York, N. Y., October 17, 1939.

JOSEPH D. MCGOLDRICK,
Comptroller of the City of New York,
Petitioner,

By SOL CHARLES LEVINE,
Counsel for Petitioner,
Municipal Building,
Borough of Manhattan,
City of New York.

Supreme Court of the United States

No. . October Term, 1939

JOSEPH D. McGOLDRICK, Comptroller of the City of New York,

Petitioner,

against

BERWIND-WHITE COAL MINING COMPANY.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

Statement of the Case.

The respondent is a Pennsylvania corporation engaged in the marketing and distribution of bituminous coal (R. 42). It is both a mine owner and an agent for mine owners, and it distributes and markets coal from its own mines in Pennsylvania, and from the mines of others in West Virginia (R. 42, 43, 137).

The only question which arises here is as to sales to New York City consumers of coal drawn by the company from its own mines in Pennsylvania and delivered in New York City. The company also makes sales for resale to New York City wholesalers which are exempt under the local law (R. 43). The resales which follow such sales are undeniably taxable (*ibid.*).

Although the company's sources of supply are in Pennsylvania and West Virginia, it has established its financial

and sales headquarters in New York City (R. 130). Its president and two out of its three vice-presidents are permanently stationed there (R. 131). Its foreign and bunkering departments, its general sales department, a research division, and an accounting department for foreign as well as domestic business are all maintained in offices in New York City (R. 130).

However, the company has never acquired storage facilities within the City (R. 45). Instead, it fulfills its contract by shipping directly to the customer from the mines. It is on this lack of storage space and the resulting delivery technique that the company chiefly relies for its claim that its sales are immune from tax.

The company's New York sales during the period in question (December 10, 1934 to December 31, 1935) aggregated $7,537,940.09. Of this amount 96%, or a total of $7,239,879.36 represented purchases by local public utilities, as follows:

Brooklyn Edison Co.	$2,467,164.83
New York Edison Co. and United Electric Light & Power Co.	2,038,109.29
Interborough Rapid Transit Co.	2,038,204.28
Williamsburg Power Plant Corp.	696,400.96
Total	$7,239,879.36

The other 4% of the company's sales amounting to $298,160.73 was divided among 15 steamship and industrial companies (Taxpayer's Exhibit 4, R. 142).

All of the Company's contracts, whether spot or term, were negotiated, executed and signed by all parties within the City of New York (R. 101). In no case did the accep-

tance occur in Pennsylvania or at any other point outside the City of New York (*ibid.*).

The coal involved was of two grades: B-Seam and C-Prime Seam (R. 42). These names express differences in heat value and chemical composition (R. 43). Other companies produce these kinds of coal (R. 135-137). B-Seam is mined throughout an area of 150 square miles in Pennsylvania (R. 136). There is no evidence as to the extent of the area in which C-Prime Seam is mined.

All orders for coal are placed in the executive offices in New York City and transmitted by them to Pennsylvania (R. 85). Delivery is then made in this way. The coal is loaded at the mines and carried over the tracks of the Pennsylvania Railroad to Hersimus Pier, Jersey City (R. 86). The consignee is not the buyer but the Berwind-White Coal Co. (R. 86). At Jersey City, the coal is dumped into the company's barges and shipped to the customers' plants on the river front or alongside ships (R. 140, 86-88).

The company concedes that both title to and possession of the coal pass to the buyers in New York City, and that the company fully controls and directs deliveries. Payments are made in New York City at the company's executive offices (R. 101). Where there is "sampling"—a process of comparing shipments with specifications—it is always carried on entirely within the City (R. 133-135).

The City sales tax imposed upon these sales is a general non-discriminatory tax of 2% upon every "transfer of title or possession" in the City of New York, of tangible personal property purchased for use rather than for resale. The tax is paid by the purchaser. It is ordinarily collected by the vendor, but if not, is payable by the purchaser directly to the petitioner as City Comptroller. The tax is not imposed where goods, although purchased in New

York City, are delivered to consumers outside the City. Article 94 of the Comptroller's Regulations; *Matter of C. G. Gunther's Sons* v. *McGoldrick*, 279 N. Y. 148 (1938). No license is required of either purchaser or vendor as a condition of making the sale.

Jurisdictional Statement and Assignment of Errors.

The Court will find these at pages 2 and 5 of the petition *supra* respectively.

Preliminary Statement.

The sole question involved in this case and the companion *DuGrenier* case is the validity of the New York City mandatory consumers' sales tax as applied to goods shipped into the state from a point outside the state. This Court has already consented to pass on this question by granting writs of certiorari in *McGoldrick* v. *Felt & Tarrant Mfg. Co.*, 307 U. S. (June 5, 1939), and *McGoldrick* v. *Compagnie Générale Transatlantique*, 307 U. S. (June 5, 1939), which are now pending on the current docket of this Court. On October 9, 1939, the Court granted the request of the City that the hearing of those cases be deferred until December 4, 1939 or such time as the petitions for certiorari in this case and the companion *DuGrenier* case shall have been acted upon. These two cases in which writs of certiorari are now requested involve factual situations which are substantially similar to those now before the Court. If these petitions for writs of certiorari are denied the City may be in the position of prevailing over the Compagnie Generale Transatlantique and the Felt & Tarrant Company in this Court, yet left without redress against these two similarly situated taxpayers.

POINT I.

The New York City sales tax, as applied to the respondent's sales, does not impose an unconstitutional burden on interstate commerce.

The question is whether the tax as applied to respondent's sales imposes a direct and immediate burden on interstate commerce. Such burden, to be the basis for invalidation, would have to be actual and not merely theoretical. The main types of applicable situations in which an unconstitutional burden has been found to be present were recently summarized in *Gwin, White & Prince, Inc.* v. *Henneford*, 305 U. S. 434 (1939). It is settled by that and other leading cases on the subject that where a tax is non-discriminatory, and where it does not impose unwarranted licensing requirements, it will be upheld provided there is no possibility of multiple taxation. *Western Live Stock* v. *Bureau*, 303 U. S. 250 (1938); *J. D. Adams Mfg. Co.* v. *Storen*, 304 U. S. 307 (1938); *Coverdale* v. *Arkansas-Louisiana Pipeline Co.*, 303 U. S. 604 (1938); *Gwin, White & Prince, Inc.* v. *Henneford*, 305 U. S. 434 (1939).

Measured by these standards, the tax at bar is clearly valid:

There is no undue burden on interstate commerce.

1. Purchasers from foreign vendors are required to pay the same tax as purchasers from local vendors, and no more. Foreign vendors are placed under the same obligation with respect to collecting the tax as local vendors. Foreign products are not discriminated against. On the other hand, local vendors, local products and local business would be discriminated against were the tax at bar held valid.

2. Interstate commerce is not interfered with by the imposition of unwarranted licensing requirements, conditions precedent to interstate selling, and the like. No license is required of purchasers or vendors. If the purchaser omits to pay the tax, he is not forbidden to make the purchase; the purchase takes place just the same.

3. In the case at bar there is no possibility of multiple taxation. The tax is not one on the gross receipts of a vendor imposed by the vendor's State; it is on the purchase of a local consumer. The tax is upon the purely local acquisition of property in the local market.

With respect to analogous taxes on consumers, the Court has already held that the state in which the consumer is may tax him. Thus, it has sustained the following consumers' taxes imposed by the buyer's state, viz.: a motor fuel (sales) tax (*Wiloil Corporation* v. *Pennsylvania*, 294 U. S. 169 [1933]); a use (sales) tax (*Monamotor Oil Co.* v. *Johnson*, 292 U. S. 86 [1934]); a "receiving (sales) tax (*J. Bacon & Sons* v. *Martin*, 303 U. S. 380 [1939]); or a property (sales) tax (*Hinson* v. *Lott*, 8 Wall. 148 [1868]). On the other hand, the Court has barred similar taxes imposed by the seller's state (*J. D. Adams Mfg. Co.* v. *Storen*, 304 U. S. 307 [1938]; *Gwin, White & Prince, Inc.* v. *Henneford*, 305 U. S. 434 [1939]). Since the tax on the sales at bar is imposed on the purchaser, by the *purchaser's* State and the tax could not be imposed on the same sales by the *seller's* State, there is no possibility of double or multiple taxation.

Since there is no possibility of multiple taxation, there is no necessity for allocation, assuming allocation to be administratively feasible in respect of a tax on a purchaser-consumer. The fact that multiple taxation is not possible itself results in a species of allocation: New York City

taxes New York City purchasers on their purchases in that City, and Pennsylvania taxes Pennsylvania purchasers on their purchases there. Pennsylvania could not claim the right to tax the purchasers of coal on their acquisition of property in New York City, any more than New York City could tax a Pennsylvania purchaser on his acquisition of property in Pennsylvania. The doctrine of territoriality as well as that of multiple taxation would forbid such a result.

4. The decisions of this Court have never gone so far as to say that a company doing some interstate business may not, when it enters a foreign state, be compelled to assume the burden, borne by domestic sellers, of collecting from its customers and transmitting to the authorities a sales tax imposed upon such customers by local law. *Cf. Monamotor Oil Co.* v. *Johnson*, 292 U. S. 86 (1934); *Felt & Tarrant Mfg. Co.* v. *Gallagher*, 306 U. S. 62 (1939). Otherwise, foreign vendors would obtain unjustifiable advantages over local competitors who are required to collect the 2% tax. Business would be encouraged to flee the taxing state and seek a point of vantage in neighboring states from which to make the identical sales free of tax. Thus, new forms of tax avoidance and evasion would be fostered.

Comparable taxes have always been upheld.

So far as we are aware, this case, and the two cases in which this Court granted certiorari on June 5, 1939, are the first cases presented to this Court in which it has been urged that a retail sales tax levied upon a purchaser-consumer imposes an invalid burden on interstate commerce. This Court has never held such a tax upon the purchaser invalid.

Moreover, so far as we know, this Court has never held invalid a tax imposed by the buyer's state upon interstate sales measured by the value or volume of the sales. See

Lockhart, *The Sales Tax in Interstate Commerce*, 52 Harvard Law Review 617, 629 (1939).

In every case where this Court has had before it a tax to which the City sales tax is at all comparable, it has upheld the tax against attack based upon the Commerce Clause. *Felt & Tarrant Mfg. Co.* v. *Gallagher*, 306 U. S. 62 (1939); *Southern Pacific Company* v. *Gallagher*, 306 U. S. 167 (1939); *Pacific Telephone & Telegraph Co.* v. *Gallagher*, 306 U. S. 182 (1939); *J. Bacon & Sons* v. *Martin*, 305 U. S. 380 (1939); *Western Live Stock* v. *Bureau*, 303 U. S. 250 (1938); *Henneford* v. *Silas Mason Co.*, 300 U. S. 577 (1937); *Wiloil Corporation* v. *Pennsylvania*, 294 U. S. 169 (1935); *Monamotor Oil Co.* v. *Johnson*, 292 U. S. 86 (1934); *Edelman* v. *Boeing Air Transp.*, 289 U. S. 249 (1933); *Nashville, C. & St. L. Railway Co.* v. *Wallace*, 288 U. S. 249 (1933); *Gregg Dyeing Co.* v. *Query*, 286 U. S. 472 (1932); *Banker Brothers* v. *Pennsylvania*, 222 U. S. 210 (1911); *Woodruff* v. *Parham*, 8 Wall. 123 (1868); *Hinson* v. *Lott*, 8 Wall. 148 (1868).

The above are all instances of non-discriminatory local taxes applied to transactions connected with interstate commerce. In all of them the burden of the tax fell on the local purchaser-consumer. In almost all, it may be added, the tax was measured by the value or volume of the sales. The New York City sales tax is not distinguishable in any material particular from most of the taxes upheld in the cases cited above.

The New York City sales tax is, moreover, *identical* in substance with the California tax (Cal. Laws of 1935, ch. 361, as amended by Cal. Laws of 1937, chs. 401, 671 and 683) sustained in *Felt & Tarrant Mfg. Co.* v. *Gallagher*, *supra*, as the following tabular comparison plainly shows:

California Tax.	*New York City Tax.*
1. The tax is imposed on the purchaser at retail of merchandise purchased for consumption and not for resale.	1. The tax is imposed on the purchaser at retail of merchandise purchased for consumption and not for resale.
2. The tax is given percentage of the sales price.	2. The tax is a given percentage of the sales price.
3. The tax is paid by the purchaser at the time of the sale.	3. The tax is paid by the purchaser at the time of the sale.
4. The tax is collected by the vendor, who files the returns.	4. The tax is collected by the vendor, who files the returns.
5. If the tax is not collected by the vendor, it is payable directly by the purchaser to the taxing official.	5. If the tax is not collected by the vendor, it is payable directly by the purchaser to the taxing official.
6. The tax law requires the vendor to insure payment of the tax if it fails to make collections from the tax debtors.	6. The tax law requires the vendor to insure payment of the tax if it fails to make collections from the tax debtors.
7. The tax is on a local event *i. e.*, "the exercise of right or power * * * incident to the ownership of that property" other than resale.	7. The tax is on a local event, *i. e.*, the "transfer of title or possession or both" for any purpose other than resale.

The fact that the California tax is termed a "use" tax and the New York City tax a "sales" tax is a difference in words, not a difference in substance. For, "use" as defined in the California statute (see paragraph 7 in the tabular comparison above), includes every acquisition of possession and so, every sale. A mere difference in name between two taxes which are substantially the same does not justify

varying constitutional treatment. As stated by this Court in *Southern Pacific Company* v. *Gallagher, supra,* 306 U. S., at page 177:

> "State taxes upon national commerce or its incidents do not depend for their validity *upon a choice of words* but upon the choice of the thing taxed." (Italics ours.)

It thus appears that in invalidating the City sales tax in the case at bar, the Court of Appeals has decided the case in a way probably not in accord with applicable decisions of this Court.

POINT II.

Respondent's sales do not require or necessarily involve interstate shipment, as that phrase is used in *Wiloil Corp.* v. *Pennsylvania,* 294 U. S. 169, 174.

In holding that respondent's sales required or necessarily involved interstate shipment, we submit, the Court misapprehended the decisions of this Court in *Wiloil Corporation* v. *Pennsylvania,* 294 U. S. 169 (1935), and *Banker Brothers* v. *Pennsylvania,* 222 U. S. 210 (1911).

In the *Wiloil* case, *supra,* as in the case at bar, the sale was made in the buyer's State, called for delivery of the merchandise in that jurisdiction, and related to standard goods. Despite the fact that the contracts called for delivery in Pennsylvania of oil "f.o.b. Wilmington, Delaware," this Court concluded that the contracts did not require or necessarily involve interstate shipment, stating, in language precisely applicable at bar (294 U. S., at p. 173):

> "Appellant was not required by the contracts to obtain the fuels at Wilmington but was free to effect

performance by shipping from any place within or without Pennsylvania."

And further (p. 174):

> "There is nothing to indicate legislative purpose to discriminate against liquid fuels brought into Pennsylvania to be delivered in fulfillment of sales contracts or there to be used or sold. The commerce clause does not prevent taxation of goods by the State in which they are found merely because brought in from another State, for that would unduly trammel state power of taxation and produce gross inequality and injustice. *Woodruff* v. *Parham* 8 Wall. 123, 137. *The limitation appellant puts on § 4 would operate to the extent of three cents a gallon in favor of liquid fuels delivered as in this case, from a place in another State, against those delivered in Pennsylvania from sources in that Commonwealth over routes wholly therein.*" (Italics ours.)

The Court indicated in a general way that the tax was upon the local sales. It pointed out, moreover, that the fact that the entire movement of the oil from Delaware into Pennsylvania involved interstate commerce—which would have been material had federal regulation been involved—was not pertinent when the inquiry was directed to state taxation of local sales (p. 175).

Finally, the Court summarized the transaction involved and the effect of the tax imposed upon it, as follows (p. 175):

> "As interstate transportation was not required or contemplated, it may be deemed as merely incidental. Cf. *Moore* v. *N. Y. Cotton Exchange*, 270 U. S. 593, 604. *Ware & Leland* v. *Mobile County*, 209 U. S. 405, 412-413. The act lays no burden on interstate commerce as such, and if any can be said to result from the imposition, it is indirect and pre-

cisely as that which would have resulted if deliveries had been made exclusively by intrastate transportation from Pennsylvania sources."

Conclusion.

The Commerce Clause does not require that in an effort to avoid undue burdens on interstate commerce, sales made within the State, under contracts made there, of goods shipped in (for the seller's convenience and economy) from outside the State, be exempted from a general consumers' sales tax. Such a tax, paid as it is by the consumer and measured by the volume of sales, is not duplicated in any other State, for the act taxed—the final passage of possession and title to the consumer—can occur in but one State. Local merchants must be protected against unjustifiable discrimination in favor of foreign vendors. The States must be protected against the serious impairment of their revenue powers by the encouragement of tax avoidance and evasion. Respondent's purchasers obtain the protection of the laws of New York for their purchases there and should not be permitted to escape the common burden of all purchasers in the local market.

The petition for certiorari should be granted.

Dated: New York, N. Y., October 17, 1939.

Respectfully submitted,

WILLIAM C. CHANLER,
PAXTON BLAIR,
SOL CHARLES LEVINE,
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APPENDIX A

Provisions of Local Law

LOCAL LAWS OF THE CITY OF NEW YORK

FOR THE YEAR 1934.

No. 24

A local law to amend local law number twenty of the year nineteen hundred and thirty-four to relieve the people of the city of New York from the hardships and suffering caused by unemployment and the effects thereof on the public health and welfare, by imposing a tax upon receipts from sales of certain properties and rendering of certain services in the city of New York, to enable such city to defray the cost of granting unemployment work and home relief.

Became a law December 28, 1934, with the approval of the Mayor. Passed on message of necessity by the local legislative body of the city of New York.

Be it enacted by the municipal assembly of the city of New York as follows:

Section 1. Local law number twenty of the local laws of the city of New York for the year nineteen hundred and thirty-four, entitled "A local law to relieve the people of the city of New York from the hardships and suffering caused by unemployment and the effects thereof on the public health and welfare, by imposing a tax upon receipts from sales of certain properties and services in the city of New York, to enable such city to defray the cost of granting unemployment work and home relief," is hereby amended so as to read as follows:

TAX ON SALES OF CERTAIN PROPERTIES AND RENDERING OF CERTAIN SERVICES IN THE CITY OF NEW YORK:

Section 1. Definitions.
2. Imposition of tax.

3. Collection of tax from purchaser.
4. Records to be kept.
5. Returns.
6. Payment of taxes.
7. Determination of tax by the comptroller.
8. Proceedings to recover tax.
9. Notices and limitations of time.
10. Refunds.
11. General powers of the comptroller.
12. Administration of oaths and compelling testimony.
13. Reference to tax.
14. Registration.
15. Penalties.
16. Returns to be secret.
17. Disposition of revenues.
18. Application; construction.

Section 1. **Definitions.** When used in this local law:

(a) The word "person" includes an individual, co-partnership, society, association, joint stock company, corporation, estate, receiver, trustee or any other person acting in a fiduciary capacity, and any combination of individuals;

(b) The word "vendor" means a person selling property or rendering services upon the receipts from which a tax is imposed under section 2 of this local law;

(c) The word "purchaser" means a person who purchases property or to whom are rendered services, receipts from which are taxable under section 2 of this local law;

(d) The word "receipt" means the amount of the sale price of any property or the charge for any service specified in section 2 of this local law, valued in money, whether re-

ceived in money or otherwise, including all receipts, cash, credits and property of any kind or nature (other than the credit allowed for property of the same kind accepted in part payment and intended for resale), and also any amount for which credit is allowed by the vendor to the purchaser, without any deduction therefrom on account of the cost of the property sold, the cost of materials used, labor or service cost, interest or discount paid, or any other expense whatsoever;

(e) The word "sale" or "selling" means any transfer of title or possession or both, exchange or barter, license to use or consume, conditional or otherwise, in any manner or by any means whatsoever for a consideration, or any agreement therefor, and may include the rendering of any service specified in section 2 of this local law;

(f) The words "tangible personal property" mean corporeal personal property;

(g) A "retail sale" or "sale at retail" means a sale to a customer, or to any person for any purpose other than for resale in the form of tangible personal property;

(h) The word "semi-public" means those charitable and religious institutions which are supported wholly or in part by public subscriptions or endowment and are not organized or operated for profit;

(i) The word "return" includes any amended return filed or required to be filed as herein provided;

(j) The word "comptroller" means the comptroller of the city of New York.

§ 2. **Imposition of tax.** During the period commencing on December tenth, nineteen hundred and thirty-four, and

ending on December thirty-first, nineteen hundred and thirty-five,* there shall be paid a tax of two per centum upon the amount of the receipts from every sale in the city of New York of:

(a) Tangible personal property sold at retail, except those articles described in schedule "A" below;

(b) Gas, electricity, refrigeration and steam, and gas, electric, refrigeration, steam, telephone and telegraph service, for domestic or commercial use;

(c) Food, drink and entertainment in restaurants, cafes and other establishments including in the amount of such receipts any cover or minimum or other charge made to patrons where the charge to the patron is one dollar or more, in which event the tax is imposed on the full amount of the charge to each such patron;

(d) Wines and liquors and other alcoholic beverages, and drinks compounded thereof or therewith, except beer or other similar malt beverages, including sales thereof in restaurants, cafes, bars and other places for consumption on the premises:

SCHEDULE A

Cereals and cereal products;
Milk and milk products;
Meat and meat products;
Fish and fish products;
Eggs and egg products;
Vegetables and vegetable products;
Fruits, spices and salt;

* The local law has been annually renewed and extended and is still in effect.

Appendix A

Sugar and sugar products, other than candy and confectionery;

Coffee and coffee substitutes; beer or other similar malt beverages; tea, cocoa and cocoa products; other than candy and confectionery;

Water, when delivered to the consumer through mains and pipes;

Drugs and medicines sold upon a physician's prescription;

Newspapers and periodicals.

The enumeration in this schedule shall not be deemed to exclude sales of wines and liquors and other alcoholic beverages, soft drinks, and sodas and beverages such as are ordinarily dispensed at bars and soda fountains or in connection therewith (other than coffee, tea and cocoa, beer and other similar malt beverages), nor any food or food products unless sold for human consumption, from the tax imposed by this local law.

Receipts from sales or services by or to the state or city of New York, and receipts from sales or services by or to semi-public institutions, and receipts upon which the state of New York and city of New York are by virtue of the provisions of the constitution of the United States or otherwise without power to impose a tax, shall not be subject to tax hereunder.

Upon each taxable sale or service the tax to be collected shall be stated and charged separately from the sale price or charge for service and shown separately on any record thereof, at the time when the sale is made or evidence of sale issued or employed by the vendor and shall be paid by the purchaser to the vendor, for and on account of the city of New York, and the vendor shall be liable for the collection or the service rendered; and the vendor shall have the same right in respect to collecting the tax from the purchaser, or

in respect to non-payment of the tax by the purchaser, as if the tax were a part of the purchase price of the property or service and payable at the time of the sale.

Where a purchaser has failed to pay and a vendor has failed to collect a tax upon a sale or service, as imposed by this local law, then in addition to all other rights, obligations and remedies provided, such tax shall be payable by the purchaser directly to the comptroller and it shall be the duty of the purchaser to file a return thereof with the comptroller and to pay the tax imposed thereon to the comptroller within fifteen days after such sale was made or service rendered.

The comptroller may, wherever he deems it necessary for the proper enforcement of this local law, provide by regulation that the purchaser shall file returns and pay directly to the comptroller the tax herein imposed, at such times as returns are required to be filed and payment over made by vendors.

The tax imposed by this local law shall be paid upon all sales made and services rendered on and after December tenth, nineteen hundred and thirty-four, although made or rendered under a contract dated prior to December tenth, nineteen hundred and thirty-four. Where a service is billed on either a monthly or other term basis, the bill for such month or other terms shall be a receipt subject to the tax herein imposed, provided that where such bill includes a period prior to December tenth, nineteen hundred and thirty-four, or subsequent to December thirty-first, nineteen hundred and thirty-five,* such bill shall be equitably apportioned. The comptroller may provide by regulation that the tax upon receipts from sales on the installment plan may be

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* See footnote, *ante*, p. 24.

paid on the amount of each installment and upon the date when such installment is due. He shall provide by regulation for the exclusion of amounts representing sales where the contract of sale has been cancelled and/or the property returned and/or the receipt has been ascertained to be worthless, or, in case the tax has been paid upon such receipts, for a credit and/or a refund of the amount of the tax upon such receipts, upon application therefor as provided in section 10.

For the purpose of the proper administration of this local law and to prevent evasion of the tax hereby imposed, it shall be presumed that all receipts for property and services mentioned in this section are subject to the tax until the contrary is established, and the burden of proving that a receipt is not taxable hereunder shall be upon the vendor or the purchaser, unless the vendor shall have taken from the purchaser a certificate signed by and bearing the name and address of the purchaser and the number of his registration certificate to the effect that the property or service was purchased for resale.

No person engaged in the business of selling property or services the receipts from which are subject to tax under this local law shall advertise or hold out to the public in any manner directly or indirectly that the tax imposed by this local law is not considered as an element in the price to the purchaser.

§ 3. **Collection of tax from purchaser.** The comptroller shall by regulation prescribe a method or methods and/or a schedule or schedules of the amounts to be collected from purchasers in respect to any receipt upon which a tax is imposed by this local law so as to eliminate fractions of one cent and so that the aggregate collections of taxes by a ven-

dor shall, as far as practicable, equal two percentum of the total receipts from the sales and services of such vendor upon which a tax is imposed by this local law. Such schedule or schedules may provide that no tax need be collected from the purchaser upon receipts below a stated sum, and may be amended from time to time so as to accomplish the purposes herein set forth.

§ 4. **Records to be kept.** Every vendor shall keep records of receipts and of the tax payable thereon, in such form as the comptroller may by regulation require. Such records shall be offered for inspection and examination at any time upon demand by the comptroller or his duly authorized agent or employee and shall be preserved for a period of three years, except that the comptroller may consent to their destruction within that period, or may require that they be kept longer.

§ 5. **Returns.** Every vendor shall file with the comptroller a return of his receipts and of the taxes payable thereon for the periods ending February twenty-eighth, May thirty-first, August thirty-first and December thirty-first, nineteen hundred and thirty-five. Such returns shall be filed within thirty days from the expiration of the periods ending February twenty-eighth and May thirty-first and within fifteen days from the expiration of the periods ending August thirty-first and December thirty-first. The comptroller may permit returns to be made by other periods so as to include all receipts during the period from December tenth, nineteen hundred and thirty-four, to December thirty-first, nineteen hundred and thirty-five,* inclusive. If he deems it necessary in order to insure the payment of the tax imposed by this local law the comptroller may require returns of

* See footnote, *ante*, p. 24.

receipts to be made for other than the aforesaid periods and upon such dates as he may specify.

The form of returns shall be prescribed by the comptroller and shall contain such information as he may deem necessary for the proper administration of this local law. The comptroller may require amended returns to be filed within twenty days after notice and to contain the information specified in the notice. [*Amended by Local Law No. 23 of 1935.*]

§ 6. **Payment of taxes.** At the time of filing a return of receipts each vendor shall pay to the comptroller the taxes imposed by this local law upon the receipts required to be included in such return. All taxes for the period for which a return is required to be filed shall be due from the vendor and payable to the comptroller on the date limited for the filing of the return for such period, without regard to whether a return is filed or whether the return which is filed correctly shows the amount of receipts and the taxes due thereon. The comptroller may require any vendor required to collect the tax imposed by this local law to file with him a bond, issued by a surety company authorized to transact business in this state and approved by the superintendent of insurance of this state as to solvency and responsibility, in such amount as the comptroller may fix, to secure the payment of any tax and/or penalties due or which may become due from such vendor. In lieu of such bond, securities approved by the comptroller, in such amount as he may prescribe, may be deposited with him, which securities shall be kept in the custody of the comptroller and may be sold by him at public or private sale, without notice to the depositor thereof, if it becomes necessary so to do in order to recover any tax and/or penalties due. Upon such sale, the

surplus, if any, above the amounts due under this local law shall be returned to the person who deposited the securities.

§ 7. **Determination of tax by comptroller.** If a return required by this local law is not filed, or if a return when filed is incorrect or insufficient the comptroller shall determine the amount of tax due from such information as he may be able to obtain and, if necessary, may estimate the tax on the basis of external indices, such as number of employees of the person concerned, rentals paid by him, his stock on hand, and/or other factors. The comptroller shall give notice of such determination to the person liable for the collection and/or payment of the tax. Such determination shall finally and irrevocably fix the tax unless the vendor or purchaser against whom it is assessed shall be entitled to and within thirty days after the giving of notice of such determination apply to the comptroller for a hearing, or shall cause the same to be reviewed by certiorari, or unless the comptroller of his own motion shall reduce the same. If no opportunity for a hearing shall have been given to such person prior to the determination of the comptroller, such person may within thirty days after the comptroller shall give notice thereof, apply to the comptroller for a hearing. After such hearing the comptroller shall give notice of his determination to the applicant. The determination of the comptroller may be reviewed by certiorari if application is made to the comptroller therefor within thirty days after the giving of notice thereof. Whenever under this local law an order of certiorari is permitted it shall not be granted unless the amount of any tax sought to be reviewed, with penalties thereon, if any, shall be first deposited with the comptroller and an undertaking filed with the comptroller, in such amount and with such sureties as a justice

of the supreme court of the state of New York shall approve, to the effect that if such order be dismissed or the tax confirmed the applicant for the writ will pay all costs and charges which may accrue in the prosecution of the certiorari proceeding.

§ 8. **Proceeding to recover tax.** Whenever any vendor or purchaser shall fail to collect and pay over any tax and/or to pay any tax or penalty imposed by this local law as in this local law provided, the corporation counsel shall, upon the request of the comptroller, bring an action to enforce the payment of the same.

As an additional or alternate remedy, the comptroller may issue a warrant, directed to the sheriff of any county within the city of New York, commanding him to levy upon and sell the real and personal property of the vendor or purchaser which may be found within his county, for the payment of the amount thereof, with any penalties, and the cost of executing the warrant, and to return such warrant to the comptroller and to pay to him the money collected by virtue thereof within sixty days after the receipt of such warrant. The sheriff shall within five days after the receipt of the warrant file with the clerk of his county a copy thereof, and thereupon such clerk shall enter in the judgment docket the name of the person mentioned in the warrant and the amount of the tax and penalties for which the warrant is issued and the date when such copy is filed. Thereupon the amount of such warrant so docketed shall become a lien upon the title to and interest in real property and chattels real of the person against whom the warrant is issued in the same manner as a judgment duly docketed in the office of such clerk. The sheriff shall then proceed upon the warrant in the same manner, and with like effect, as that pro-

vided by law in respect to executions issued against property upon judgments of a court of record, and for services in executing the warrant he shall be entitled to the same fees, which he may collect in the same manner. In the discretion of the comptroller a warrant of like terms, force and effect may be issued and directed to any officer or employee of the department of finance, and in the execution thereof such officer or employee shall have all the powers conferred by law upon sheriffs, but he shall be entitled to no fee or compensation in excess of the actual expenses paid in the performance of such duty. If a warrant is returned not satisfied in full, the comptroller may from time to time issue new warrants and shall also have the same remedies to enforce the amount due thereunder as if the city of New York had recovered judgment therefor and execution thereon had been returned unsatisfied.

§ 9. **Notices and limitations of time.** Any notice authorized or required under the provisions of this local law may be given by mailing the same to the person for whom it is intended in a postpaid envelope addressed to such person at the address given in the last return filed by him pursuant to the provisions of this local law or in any application made by him or if no return has been filed or application made then to such address as may be obtainable. The mailing of such notice shall be presumptive evidence of the receipt of the same by the person to whom addressed. Any period of time which is determined according to the provisions of this local law by the giving of notice shall commence to run from the date of mailing of such notice.

The provisions of the civil practice act relative to limitations of time for the enforcement of a civil remedy shall

not apply to any proceeding or action taken to levy, appraise, assess, determine or enforce the collection of any tax or penalty provided by this local law.

§ 10. **Refunds.** The comptroller shall refund any tax erroneously or illegally collected and paid to him if application therefor shall be made within one year from the payment thereof. Such application may be made by the person upon whom such tax was imposed, or by the vendor who collected and paid such tax to the comptroller if such vendor establishes to the satisfaction of the comptroller, under such regulations as he may prescribe, that he has repaid to the purchaser the amount for which application for refund is made. The comptroller may, in lieu of any refund required to be made, allow credit therefor on subsequent payments due from the applicant. Notice of the determination of the comptroller of any application for refund shall be given to the applicant, who shall be entitled to a certiorari order to review such determination, provided application therefor is made within thirty days after the giving of such notice. An order of certiorari shall not be granted hereunder except in accordance with the provisions of section 7.

§ 11. **General powers of the comptroller.** In addition to the powers granted to the comptroller in this local law, he is hereby authorized and empowered:

(a) To make, adopt and amend rules and regulations appropriate to the carrying out of this local law and the purposes thereof;

(b) To extend, for cause shown, the time of filing any return for a period not exceeding thirty days; and for cause

shown, to remit penalties and interest; and to compromise disputed claims in connection with the taxes hereby imposed;

(c) To assess, revise, readjust and impose the taxes authorized to be imposed under this local law;

(d) To request information from the tax commission of the state of New York relative to any person; and to afford information to such tax commission relative to any person, any other provision of this local law to the contrary notwithstanding;

(e) To delegate his functions hereunder to a deputy comptroller or other employee or employees of the department of finance of the city of New York;

(f) To prescribe methods for determining the receipts from sales made or services rendered in the city of New York.

§ 12. **Administration of oaths and compelling testimony.** The comptroller or his employee duly designated and authorized by the comptroller shall have power to administer oaths and take affidavits in relation to any matter or proceeding in the exercise of the powers and duties of the comptroller under this local law. The comptroller shall have power to subpoena and require the attendance of witnesses and the production of books, papers and documents to secure information pertinent to the performance of his duties hereunder and of the enforcement of this local law, and to examine them in relation thereto, and to issue commissions for the examination of witnesses who are out of the state or unable to attend before him or excused from attendance.

A justice of the supreme court either in court or at chambers shall have power summarily to enforce by proper proceedings the attendance and testimony of witnesses and the production and examination of books, papers and documents called for by the subpoena of the comptroller hereunder.

Any person who shall refuse to testify or to produce books or records or who shall testify falsely in any material matter pending before the comptroller hereunder shall be guilty of a misdemeanor, and punishment for which shall be a fine of not more than one thousand dollars or imprisonment for not more than one year, or both such fine and imprisonment.

The officers who serve the comptroller's summons or subpoena hereunder and witnesses attending in response thereto shall be entitled to the same fees as are allowed to officers and witnesses in civil cases in courts of record, except as herein otherwise provided.

§ 13. **Reference to tax.** Wherever reference is made in sales tags or placards or advertisements to this tax, such reference shall be substantially in the following form: "City sales tax for relief of unemployed," except that in any evidence or memorandum of sales issued or employed by the vendor the word "tax" will suffice.

§ 14. **Registration.** On or before January tenth, nineteen hundred and thirty-five, or in the case of vendors commencing business after January seventh, nineteen hundred and thirty-five, or opening new places of business after such date, within three days after such commencement or opening, every vendor required to collect the tax imposed by this local law shall file with the comptroller a certificate of regis-

tration in a form prescribed by the comptroller who shall within five days after such registration issue without charge to each such vendor a certificate of authority empowering such vendor to collect the tax from the purchaser and duplicates thereof for each additional place of business of such vendor. Each certificate or duplicate shall state the place of business to which it is applicable. Such certificates of authority shall be prominently displayed in the places of business of the vendor. A vendor who has no regular place of doing business shall attach such certificate to his cart, stand, truck, or other merchandising device. Such certificates shall be non-assignable and non-transferable and shall be surrendered immediately to the comptroller upon the vendor's ceasing to do business at the place therein named.

A vendor shall refuse to accept a certificate that any property or service upon which a tax is imposed by this local law is purchased for resale and shall collect the tax imposed by this local law unless the purchaser shall have filed a certificate of registration and received a certificate of authority to collect the tax imposed by this local law; provided, however, that the payment of the tax by such purchaser shall not relieve the purchaser of the duty herein imposed upon such purchaser to collect the tax upon any resale made by him; but such purchaser who shall thereafter file a certificate of registration and receive a certificate of authority to collect the tax may, upon application therefor, receive a refund of the taxes paid by him upon property and services thereafter resold by him and upon the receipts from which he shall have collected and paid over to the comptroller the tax herein imposed.

§ 15. **Penalties.** Any person failing to file a return or to pay or pay over any tax to the comptroller within the

time required by this local law shall be subject to a penalty of five per centum of the amount of tax due, plus one per centum of such tax for each month of delay or fraction thereof excepting the first month after such return was required to be filed or such tax became due; but the comptroller, if satisfied that the delay was excusable, may remit all or any part of such penalty. Such penalty shall be paid and disposed of in the same manner as other revenues from this local law. Unpaid penalties may be enforced in the same manner as the tax imposed by this local law.

Any vendor or purchaser and any officer of a corporate vendor or purchaser failing to file a return required by this local law, or filing or causing to be filed or making or causing to be made or giving or causing to be given any return, certificate, affidavit, representation, testimony or statement required or authorized by this local law, which is wilfully false, and any vendor and any officer of a corporate vendor wilfully failing to file a registration certificate or to display or surrender the certificate of authority as required by this local law or assigning or transferring such certificate of authority, and any vendor and any officer of a corporate vendor wilfully failing to charge separately from the sales price the tax herein imposed, or wilfully failing to state such tax separately on any evidence of sale issued or employed by the vendor, or wilfully failing or refusing to collect such tax from the purchaser, and any vendor and any officer of a corporate vendor who shall refer or cause reference to be made to this tax in any sales tag, placard or advertisement in a form other than that required by this local law, shall, in addition to the penalties herein or elsewhere prescribed, be guilty of a misdemeanor, punishment for which shall be a fine of not more than one thousand dollars or imprison-

ment for not more than one year, or both such fine and imprisonment.

The certificate of the comptroller to the effect that a tax has not been paid, that a return has not been filed, or that information has not been supplied pursuant to the provisions of this local law, shall be presumptive evidence thereof.

§ 16. **Returns to be secret.** 1. Except in accordance with proper judicial order or as otherwise provided by law, it shall be unlawful for the comptroller or any officer or employee of the department of finance to divulge or make known in any manner the receipts or other information relating to the business of a taxpayer contained in any return required under this local law. The officers charged with the custody of such returns shall not be required to produce any of them or evidence of anything contained in them in any action or proceeding in any court, except on behalf of the comptroller in an action or proceeding under the provisions of this local law, or on behalf of any party to any action or proceeding under the provisions of this local law when the returns or facts shown thereby are directly involved in such action or proceeding, in either of which events the court may require the production of, and may admit in evidence, so much of said returns or of the facts shown thereby, as are pertinent to the action or proceeding and no more. Nothing herein shall be construed to prohibit the delivery to a taxpayer or his duly authorized representative of a certified copy of any return filed in connection with his tax nor to prohibit the publication of statistics so classified as to prevent the identification of particular returns and the items thereof, or the inspection by the corporation counsel or

other legal representatives of the city, or by the district attorney of any county within the city of New York, of the return of any taxpayer who shall bring action to set aside or review the tax based thereon, or against whom an action or proceeding has been instituted for the collection of a tax or penalty. Returns shall be preserved for three years and thereafter until the comptroller orders them to be destroyed.

2. Any offense against subdivision one of this section shall be punished by a fine not exceeding one thousand dollars or by imprisonment not exceeding one year, or both, at the discretion of the court, and if the offender be an officer or employee of the city he shall be dismissed from office and be incapable of holding any public office in this city for a period of five years thereafter.

§ 17. **Disposition of revenues.** All revenues and monies resulting from the imposition of the taxes imposed by this local law shall be paid into the treasury of the city of New York and shall not be credited or deposited in the general fund of the city of New York, but shall be deposited in a separate bank account or accounts, and shall be available and used solely and exclusively for the purpose of relieving the people of the city of New York from the hardships and suffering caused by unemployment including the repayment of monies borrowed or to be borrowed in anticipation of this tax.

§ 18. **Application; construction.** If any provision of this local law, or the application thereof to any person or circumstances, is held invalid, the remainder of this local law, and the application of such provisions to other persons or circumstances shall not be affected thereby. This local

law shall be construed in conformity with chapter eight hundred seventy-three, laws of nineteen hundred and thirty-four, pursuant to which it is enacted.

§ 2. **Effective date of local law.** This local law shall take effect immediately.

The City of New York, Office of the City Clerk, ss:

I hereby certify that the foregoing is a true copy of a local law passed by both branches of the Municipal Assembly of The City of New York and approved by the Mayor on December 28, 1934, on file in this office.

MICHAEL J. CRUISE,
City Clerk.

APPENDIX B

Provisions of State Enabling Act

LAWS OF NEW YORK

1934

CHAPTER 873.

AN ACT to enable, temporarily, any city of the state having a population of one million inhabitants or more to adopt and amend local laws, imposing in any such city any tax and/or taxes which the legislature has or would have power and authority to impose to relieve the people of any such city from the hardships and suffering caused by unemployment and to limit the application of such local laws.

Became a law August 18, 1934, with the approval of the Governor. Passed, on emergency message, by a two-thirds vote.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Notwithstanding any other provision of law to the contrary, any city of the state having a population of one million inhabitants or more acting through its local legislative body, is hereby authorized and empowered until December thirty-first, nineteen hundred thirty-five * to adopt and amend local laws imposing in any such city any tax and/or taxes which the legislature has or would have power and authority to impose to relieve the people of any such city from the hardships and suffering caused by unemployment and make provision for the collection thereof by the chief fiscal officer of any such city. The tax or taxes imposed pursuant to such local laws shall be effective only during the period commencing when this act becomes effective

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* The powers have been annually extended and have not yet expired.

and ending December thirty-first, nineteen hundred thirty-five,* or any portion of such period. A tax imposed hereunder shall have application only within the territorial limits of any such city and shall be in addition to any and all other taxes.

This act shall not authorize the imposition of a tax on any transaction originating and/or consummated outside of the territorial limits of any such city, notwithstanding that some act be necessarily performed with respect to such transaction within such limits.

This act shall not authorize the imposition of a tax on a non-resident of such city or on account of any transaction by or with a non-resident of such city, except when imposed without discrimination as between residents and non-residents, on account of tangible property actually located or income earned, or trades, businesses or professions carried on within such city, or on account of transfers, retail sales or other transactions actually made or consummated within such city by a non-resident while within such city. A corporation shall not be deemed a non-resident by reason of the fact its principal place of business is not within the city.

A person who has a permanent place of abode without such city and lives more than seven months of the year out of such city shall be deemed a non-resident within the meaning of this act.

Provided, however, that nothing herein contained shall limit or prevent the imposition of a tax on gross income or a tax on gross receipts of persons, firms and corporations doing business in any such city. No such person, firm or corporation, however, shall be subject to the imposition

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* See footnote, *ante*, p. 41.

of more than one tax by any such city on gross income or gross receipts under the provisions of this act.

§ 2. Revenues resulting from the imposition of taxes authorized by this act shall be paid into the treasury of any such city and shall not be credited or deposited in the general fund of any such city, but shall be deposited in a separate bank account or accounts and shall be available and used solely and exclusively for the relief purposes for which the said taxes have been imposed under the provisions of this act.

Such legislative body may authorize the performance of public work for the relief purposes aforesaid to be paid for out of the tax or taxes, imposed under this act, and which may be undertaken other than by contract by such municipal corporation, during the period aforesaid, through and under its local emergency work bureau or by its public welfare or other department under the supervision and control of its local emergency work bureau. These provisions shall be effective notwithstanding any provisions contained in any charter, or in any general, special or local laws to the contrary and notwithstanding any such provisions therein contained requiring such work as may be undertaken to be let by contract.

§ 3. This act shall take effect immediately.

STATE OF NEW YORK, DEPARTMENT OF STATE, ss.:

I have compared the preceding with the original law on file in this office, and do hereby certify that the same is a correct transcript therefrom and of the whole of said original law.

EDWARD J. FLYNN,
Secretary of State.

APPENDIX C.

Memorandum Opinion of Appellate Division.

In the Matter of the Application of THE BERWIND-WHITE COAL MINING COMPANY, Petitioner, for an Order against JOSEPH D. MCGOLDRICK, as Comptroller of the City of New York, Respondent.—Determination of the comptroller that the petitioner The Berwind-White Coal Mining Company is liable for a sales tax deficiency unanimously annulled, with fifty dollars costs and disbursements to the petitioner, on the authority of *Matter of National Cash Register Co.* v. *Taylor* (276 N. Y. 208); *Matter of Compagnie Générale Transatlantique* v. *McGoldrick* (279 id. 192). The comptroller is directed to make refund to petitioner of the tax and penalties paid, with interest thereon from the date of payment. Settle order on notice. Present—MARTIN, P.J., GLENNON, UNTERMYER, DORE and CALLAHAN, JJ.

[255 App. Div. 961]

LAWYERS PRESS, INC., 165 William St., N. Y. C.; 'Phone: Beekman 3-2300.

(27293)

Supreme Court of the United States

No. 475. October Term, 1939.

JOSEPH D. McGOLDRICK, Comptroller of the City of New York,
Petitioner,
against
BERWIND-WHITE COAL MINING COMPANY.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK.

BRIEF FOR PETITIONER.

December 18, 1939.

WILLIAM C. CHANLER,
Corporation Counsel of the City of New York,
Counsel for Petitioner,
Municipal Building,
New York, N. Y.

WILLIAM C. CHANLER,
SOL CHARLES LEVINE,
EDMUND B. HENNEFELD,
JEROME R. HELLERSTEIN,
MILTON SANDBERG,
of Counsel.

452 Appeal Printing Co., Inc., 130 Cedar St., New York - WOrth 2-3242

INDEX

	PAGE
Opinions Below	2
Jurisdiction	2
Statement of the Case	3
History of the tax at bar	4
Provisions of the tax law at bar	6
Specification of Errors to be Urged	8
Summary of Argument	9
POINT I—A State taxing statute can be invalidated under the Commerce Clause only if it subjects interstate commerce to such a burden as is tantamount to an interference with the power of Congress to regulate commerce among the several States	12
A. Whether or not a State taxing statute interferes with interstate commerce is a question of fact	14
B. Without reference to decided cases, it is apparent on the facts that the tax at bar does not interfere with interstate commerce, because its burden is identical whether the goods are delivered from within or without the State	16
POINT II—The tax at bar is indistinguishable on the facts and in practical effect upon commerce from the "use taxes" recently sustained by this Court	19

PAGE

POINT III—A consideration of the decisions of this Court indicates that in order to maintain equality between interstate and intrastate commerce, the Court has insisted that, while interstate commerce must pay its way, it may not be subjected to a greater burden, or to the danger of a greater burden, than local commerce 24

In discussing the cases, the distinction between those relating to regulatory statutes and those relating to purely taxing statutes like that at bar must be borne in mind 24

A. While interstate commerce is not exempt from State taxation, discriminatory taxes are clearly invalid 26

B. Taxes of such a nature that, if valid, they might with equal right be imposed by several States, merely because interstate commerce is being done, subject interstate commerce to a burden of cumulative taxation not borne by local commerce, and are void 29

(1) The case of Robbins *v.* Shelby County Taxing District is illustrative of all of the vices found in State statutes invalidated by the Court under the Commerce Clause 34

(2) A tax imposed upon a local activity, or imposed on an interstate transaction before the interstate movement has commenced or after it has come to rest, is valid because it cannot be imposed in more than one State 38

POINT IV—The tax at bar is valid under the decisions of this Court because it does not subject interstate commerce to a greater burden, or to the danger of a greater burden, than would result if no interstate commerce were involved 41

PAGE

A. The tax is imposed upon the transfer of possession for use or consumption, a local event which can take place in only a single State 42

B. The tax is imposed not upon the seller but upon buyers local to New York who cannot be taxed in any other State 43

C. A tax upon a purchaser-consumer is not a tax upon interstate commerce in any event: the purchaser for consumption is not engaged in interstate commerce 46

D. The imposition by another State of a tax on the seller upon the same transaction would not impose a burden of multiple taxation "merely because the commerce is being done", since such a tax could also be imposed upon local sellers 47

POINT V—Practical, social and economic considerations require that the tax at bar be sustained 50

Conclusion 52

Table of Cases

Adams Mfg. Co. *v.* Storen, 304 U. S. 307 (1938) 40, 46, 48
Alpha Cement Co. *v.* Massachusetts, 268 U. S. 203 (1925) 33, 34
American Mfg. Co. *v.* St. Louis, 250 U. S. 459 (1919) 38, 43, 48
Asher *v.* Texas, 128 U. S. 129 (1888) 32
Atlantic Coast Line R. R. Co. *v.* Daughton, 262 U. S. 412 (1923) 34
Baldwin *v.* Seelig, 294 U. S. 511, 523 (1935) 12
Baltic Mining Co. *v.* Massachusetts, 231 U. S. 68 (1913) 15
Bass, Ratcliff & Gretton *v.* State Tax Commission, 266 U. S. 271 (1924) 34

PAGE

Brennan *v.* Titusville, 153 U. S. 289 (1894) 32
Brown *v.* Maryland, 12 Wheat. 419 (1827) 26, 27
Caldwell *v.* North Carolina, 187 U. S. 622 (1903) 32
Case of the State Freight Tax, 15 Wall. 232 (1872) 30, 31, 36, 37, 46
Cheney Bros. Co. *v.* Massachusetts, 246 U. S. 147 (1918) 33
Conn. General Life Insurance Co. *v.* Johnson, 303 U. S. 77 (1938) 45
Cook *v.* Pennsylvania, 97 U. S. 566 (1878) 27
Coverdale *v.* Arkansas-Louisiana Pipe Line Co., 303 U. S. 604 (1938) 39, 40, 43
Crenshaw *v.* Arkansas, 227 U. S. 389 (1913) 32
Crutcher *v.* Kentucky, 141 U. S. 47, 57 (1891) 33
Curry *v.* McCanless, 307 U. S. 357 (1939) 45
Davis *v.* Virginia, 236 U. S. 697 (1915) 32
Dozier *v.* Alabama, 218 U. S. 124 (1910) 32
Edelman *v.* Boeing Air Transport, Inc., 289 U. S. 249 (1933) 43
Felt & Tarrant Mfg. Co. *v.* Gallagher, 306 U. S. 62 (1939) 19, 45
Ficklen *v.* Shelby County Taxing District, 145 U. S. 1 (1892) 37, 39, 43
Fisher's Blend Station *v.* State Tax Comm., 297 U. S. 650 (1936) 46
Gibbons *v.* Ogden, 9 Wheat. 1 (1824) 13
Graves *v.* New York *ex rel.* O'Keefe, 306 U. S. 466, 481 (1939) 16
Graybar Electric Co. *v.* Curry, 308 U. S. (Nov. 6, 1939), affirming, Ala. , 189 So. 186 (1939) 22
Gregg Dyeing Co. *v.* Query, 286 U. S. 472 (1932) 39, 48
Gwin, White & Prince, Inc. *v.* Henneford, 305 U. S. 434 (1939) 40, 46, 48
Henneford *v.* Silas Mason Co., 300 U. S. 577, 584 (1937) 50
Hinson *v.* Lott, 8 Wall. 148 (1868) 28
Hump Hairpin Co. *v.* Emmerson, 258 U. S. 290, 295 (1922) 15

PAGE

International Textbook Co. *v.* Pigg, 217 U. S. 91 (1910) 25

Kansas City Ry. *v.* Kansas, 240 U. S. 227, 233 (1916) 15

Lawrence *v.* State Tax Commission, 286 U. S. 276 (1932) 44

Leloup *v.* Port of Mobile, 127 U. S. 640 (1888) 31, 46

McCall *v.* California, 136 U. S. 104 (1890) 31

Matter of Gunther's Sons *v.* McGoldrick, 279 N. Y. 148 (1938) 44

Matter of Kesbec, Inc. *v.* McGoldrick, 278 N. Y. 293 (1938) 7

Matter of Merchants Refrigerating Co. *v.* Taylor, 275 N. Y. 113, 124 (1937) 7, 49

Minnesota *v.* Blasius, 290 U. S. 1 (1933) 43, 44

Nashville C. & St. L. Ry. *v.* Wallace, 288 U. S. 249 (1933) 48

New Orleans *v.* Stempel, 175 U. S. 309 (1899) 44

New York Rapid Transit Corp. *v.* City of New York, 303 U. S. 573 (1938) 5

Norfolk & Western Railroad Co. *v.* Pennsylvania, 136 U. S. 114 (1890) 31

Norfolk & Western Ry. Co. *v.* Sims, 191 U. S. 441 (1903) 32

Ozark Pipe Line Corp. *v.* Monier, 266 U. S. 555 (1925) 34

Pacific Telephone & Telegraph Co. *v.* Gallagher, 306 U. S. 182 (1939) 19

Philadelphia & Southern S.S. Co. *v.* Pennsylvania, 122 U. S. 326 (1887) 31

Pickard *v.* Pullman Southern Car Co., 117 U. S. 34 (1886) 31, 46

Puget Sound Co. *v.* Tax Commission, 302 U. S. 90 (1937) 34

Pullman Co. *v.* Kansas, 216 U. S. 56 (1910) 33, 34

Robbins *v.* Shelby County Taxing District, 120 U. S. 489 (1887) 10, 34, 37, 46

Rogers *v.* Arkansas, 227 U. S. 401 (1913) 32

PAGE

Shaffer *v.* Carter, 252 U. S. 37 (1920) 45
Southern Pacific Co. *v.* Gallagher, 306 U. S. 167 (1939) 19, 20, 21, 40, 43
Stockard *v.* Morgan, 185 U. S. 27 (1902) 32
Stone *v.* Interstate Natural Gas Co., 103 F. (2d) 544, affirmed, 308 U. S. (Dec. 11, 1939) 34
Underwood Typewriter Co. *v.* Chamberlain, 254 U. S. 113 (1920) 34
United States Glue Co. *v.* Town of Oak Creek, 247 U. S. 321 (1918) 34
Utah Power & Light Co. *v.* Pfost, 286 U. S. 165 (1932) 43
Walling *v.* Michigan, 116 U. S. 446 (1886) 27
Ward *v.* Maryland, 12 Wall. 418 (1870) 27
Webber *v.* Virginia, 103 U. S. 344 (1880) 27
Welton *v.* Missouri, 91 U. S. 275 (1875) 27, 32
Western Live Stock *v.* Bureau of Revenue, 303 U. S. 250 (1938) 38, 40, 45, 48, 51
Western Union Tel. Co. *v.* Kansas, 216 U. S. 1 (1910) 33, 34
Western Union Tel. Co. *v.* Texas, 105 U. S. 460 (1881) 31
Wiloil Corporation *v.* Pennsylvania, 294 U. S. 169 (1935) 8, 42
Woodruff *v.* Parham, 8 Wall. 123 (1868) 27, 28, 29
Yale & Towne Mfg. Co. *v.* Travis, 252 U. S. 60 (1920) 45

Other Authorities

California Laws of 1935, ch. 361, as amended by Laws of 1937, chs. 401, 671 and 683 20

Law Review Articles:

Lockhart, The Sales Tax in Interstate Commerce, 52 Harv. L. Rev. 617 (1939) 38

Powell, Contemporary Commerce Clause Controversies over State Taxation, 76 U. of Pa. L. Rev. 773, 958, 962 (1928) 34

PAGE

New York City Laws:
Local Law No. 19 of 1933 5
Local Law No. 9 of 1934 5
Local Law No. 20 of 1934, as amended 6
Local Law No. 25 of 1934 6

New York Laws:
Laws of 1933, ch. 815 5
Laws of 1934, ch. 873 ..... 5, 42, 44, 49
Civil Practice Act, Art. 78 2

Regulations:
Business Tax Regulations, Art. 238 49
Sales Tax Regulations, Art. 94 42

Texts:
Federalist, No. XXXII (Hamilton) 13
Harding, Double Taxation of Property and Income, 252 *et seq.* (1933) 34
Powell, Business Taxation and Interstate Commerce, Proc. Nat. Tax Ass'n (1937), pp. 337-359 22
Webster's New International Dictionary 47

United States Code, Tit. 28, Sec. 344, subsec. b 2

United States Constitution:
Art. 1, Sec. 8, Cl. 3 ..... 1, 2, 12
Fourteenth Amendment 5

Supreme Court of the United States

No. 475. October Term, 1939.

JOSEPH D. McGOLDRICK, Comptroller of the City of New York,
Petitioner,
against
BERWIND-WHITE COAL MINING COMPANY.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK.

BRIEF FOR PETITIONER.

A writ of certiorari was granted by this Court on December 4, 1939, to review a final order of the Court of Appeals, affirming (one Judge dissenting) a final order of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department nullifying the petitioner's determination that certain sales taxes were due and owing to him as Comptroller of the City of New York. The amount of the tax in controversy is $176,703.89, with interest, and the period embraced is December 10, 1934 to December 31, 1935 (R. 151).

The Court of Appeals nullified the petitioner's determination upon the sole ground that to require the respondent to collect the sales tax from its New York customers on their local purchases for consumption of coal shipped from Pennsylvania, was violative of the Commerce Clause (Art. I, Sec. 8, Cl. 3).

Opinions Below.

The memorandum opinion of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department (R. 150), before which the proceedings to review the Comptroller's determination were heard in the first instance (New York Civil Practice Act, Art. 78), is reported in 255 App. Div. 961 (1938). The Court of Appeals wrote no opinion, but said:

> "Order affirmed with costs; no opinion." (281 N. Y. mem. 34, 22 N. E. (2d) 173 [1939]).

In a supplemental memorandum on motion for reargument or amendment of the remittitur, the Court of Appeals added to the foregoing memorandum the words (R. 158):

> "upon the sole ground that the City Sales Tax Law as here applied violates the Commerce Clause (Art. 1, sec. 8, cl. 3) of the Constitution of the United States." (281 N. Y. mem. 94, 22 N. E. (2d) 764 [1939]).

Jurisdiction.

The writ of certiorari was issued pursuant to the power conferred upon this Court by U. S. Code, Title 28, §344, subsec. b. The decision below having sustained the claimed federal right, and the federal question being the sole ground of the decision, a case was made out within the cited statute for this Court to issue the writ.

Statement of the Case.

The respondent, to whom we shall generally refer as the "taxpayer", is a Pennsylvania corporation engaged in the marketing and distribution of bituminous coal from its own mines in Pennsylvania, and from the mines of others in West Virginia (R. 27-28, 106).

The only question here involved relates to sales of coal mined by the taxpayer in its Pennsylvania mines and delivered in New York City to local consumers.

Of the taxpayer's New York sales during the period in question (December 10, 1934 to December 31, 1935), 96%, or a total of $7,239,879.36 out of $7,537,940.09, represented purchases by local public utilities for local use in the generation of power (Taxpayer's Exhibit 4, R. 109). The other 4% of the taxpayer's sales, amounting to $298,160.73, was divided among 15 industrial and miscellaneous companies (*Ibid.*).

Although the taxpayer's sources of supply are out of the State, it has established its financial and sales headquarters in New York City (R. 100). Its President and two out of its three Vice-Presidents are permanently stationed there (R. 100-101). Its foreign and bunkering departments, its general sales department, its accounting department and research division are all maintained in offices in New York City (*Ibid.*).

All of the taxpayer's contracts are negotiated, executed and signed by all parties within the City of New York (R. 76). In no case does the offer or acceptance occur in Pennsylvania or at any other point outside of the City of New York (*Ibid.*).

However, the taxpayer has never acquired storage facilities within the City (R. 30). Instead, it fulfills its contracts by shipping directly to the customer from the mines (R. 30-33). It is on this method of delivery that the taxpayer chiefly relies for its claim that its sales are constitutionally immune from tax.

All orders for coal are placed in the executive office in New York City and transmitted by that office to Pennsylvania (R. 63). In Pennsylvania the coal is loaded into cars, consigned by the taxpayer to itself, and carried by rail to Hersimus Pier, New Jersey (R. 63-64). The taxpayer transfers the coal to its own barges at Jersey City and brings it to the customers' plants on the river front or alongside ships in New York City (R. 63-65, 108).

It is conceded that both title to and possession of the coal pass to the buyers in New York City, (R. 76).

Payments are generally made in New York City at the taxpayer's executive office (R. 101-102), and "sampling" —a process of comparing shipments with specifications—is always carried on entirely within the City (R. 103-104).

The coal involved is of two grades: B-Seam and C-Prime Seam, representing differences in heat value and chemical composition (R. 28). Other companies produce these types of coal (R. 104-105). Berwind-White coal may be purchased from New York City wholesalers (R. 29), in which case a tax is undeniably payable.

History of the tax at bar.

This tax was first enacted on December 10, 1934, as part of a comprehensive program of tax measures by which New York City was to finance its pressing emer-

gency relief needs on a pay-as-you-go basis.[1] As appears from the Appendix of Statutes to be submitted on the argument, it was enacted pursuant to emergency enabling legislation passed by the State legislature (Laws of 1933, ch. 815 [Appendix C], Laws of 1934, ch. 873 [Appendix B], and amendments and renewals thereof). The enabling act declared that an emergency existed requiring the imposition of taxes "to relieve the people * * * from the hardships and suffering caused by unemployment and the effects thereof on the public health and welfare." It authorized the City of New York to "adopt and amend local laws imposing in any such city any tax which the legislature has or would have power and authority to impose." The revenues from the taxes were required to be used exclusively for unemployment relief.

The first tax imposed by the City of New York pursuant to this authorization was a tax on utility companies, measured by their gross receipts (Local Law No. 19 of 1933). The next tax was a general tax on merchants and other businessmen for the privilege of carrying on business in the City, measured by the gross receipts from such business (Local Law No. 9 of 1934). In the main, the measure of this tax consisted of the receipts from sales of goods and services. Both of these taxes have been continued down to date and are the taxes by which the City of New York has placed a portion of the relief tax burden on persons selling tangible personal property or services or doing other business in the City of New York.

It soon became evident that the revenue to be derived from taxing utilities and vendors of goods and

[1] Certain of these measures were before this Court in *New York Rapid Transit Corp.* v. *City of New York*, 303 U. S. 573 (1938), where they were sustained as against asserted contravention of the Fourteenth Amendment.

services and other businesses under these levies was inadequate to finance New York City's $70,000,000 emergency relief needs. As a result, the City was obliged to borrow large sums of money for relief purposes and faced a serious financial crisis.

Accordingly, the Municipal Assembly, looking about for other sources of revenue, determined that the $50,000,000 a year necessary to fill up the void, could be raised only by a tax with a broad base upon consumers. Thereby, consumers would bear the main burden of local relief. The intent was that all New York City purchasers would bear the tax.

Having determined to place the burden of local relief on New York City consumers, the Municipal Assembly enacted two tax laws for that purpose: a tax on consumers based upon their local purchases for consumption (Local Law No. 20 of 1934, as amended, printed as Appendix A in the Appendix of Statutes), and a personal property tax designed primarily to pick up extracity purchases (Local Law No. 25 of 1934).

Provisions of the tax law at bar.

The tax imposed by Local Law No. 20 of 1934, as amended, is limited to purchases for consumption. Purchases for resale are exempt under a definition of retail sale having that express purpose (Sec. 1g). A purchaser who has paid the tax and later resold may, upon filing a proper certificate of resale, obtain a refund of the taxes paid (Sec. 14).[1]

[1] Under the business tax law, on the other hand, wholesale as well as retail vendors are taxed.

The sales tax applies with respect to the following kinds of purchaser-consumers (Secs. 2a, b, c and d):

1) Consumers of goods,[1] excluding food and drugs on prescription.

2) Consumers of utility services,[2] *i. e.*, gas, electricity, telephone, etc.

3) Customers in restaurants and cafes where the meals are over $1.[3]

The tax is imposed not on the seller[4] but on the buyer. The statute makes this abundantly clear and the Courts have so held. *Matter of Merchants Refrigerating Co.* v. *Taylor*, 275 N. Y. 113 (1937); *Matter of Kesbec, Inc.* v. *McGoldrick*, 278 N. Y. 293 (1938).

The statute provides that the tax is payable "by the purchaser to the vendor, for and on account of the city of New York" (Sec. 2). The vendor is liable for collection, filing of returns and payment over to the City and has "the same right in respect to collecting the tax from the purchaser, or in respect to non-payment of the tax by the purchaser as if the tax were a part of the purchase price of the property or service" (Sec. 2). The vendor is required to state and charge the tax separately from the sales price (Sec. 2). Failure to do so or failure to collect the tax as such renders the vendor subject to criminal penalties. It is also a crime for the vendor to advertise that he is absorbing the tax (Secs. 2, 15). Where the vendor fails to collect the tax, the purchaser-consumer is required within fifteen days

[1] The *vendors* of goods, on the other hand, were being taxed under the business tax law.

[2] The *vendors* of utility services were being taxed under the utility tax law.

[3] The *restaurateurs* were liable for a business tax.

[4] No license is required of the seller, or of anyone else for that matter, as a condition of making the sale.

to file a return and pay the tax directly to the Comptroller, and the Comptroller is authorized to proceed directly against the purchaser for payment of the tax (Sec. 2).

Specification of Errors to be Urged.

We contend that the Court of Appeals erred:

(a) In holding that the New York City sales tax as applied to the respondent's sales constituted an unconstitutional burden on interstate commerce.

(b) In holding that the sales which were the subject of the tax were contracts for interstate shipments, or otherwise required or necessarily involved interstate commerce, giving in so holding an erroneous interpretation of *Wiloil Corporation* v. *Pennsylvania* (294 U. S. 169) [1935].

(c) In regarding itself as compelled by the Commerce Clause to affirm the determination of the Appellate Division, and annul petitioner's determination of tax liability.

Summary of Argument.

It will be our purpose in this brief to demonstrate that, from whatever angle the problem is approached, the burden and effect of the tax at bar are the same, whether imposed upon a sale of goods produced or stored within or without the State.

It is our contention that if we are correct in that analysis, the tax must be sustained. For if its effect on interstate commerce is identical with its effect upon local commerce, it cannot violate the Commerce Clause.

We propose to develop this thesis under the following points:

POINT I.

A State taxing statute can be invalidated under the Commerce Clause only if it subjects interstate commerce to such a burden as is tantamount to an interference with the power of Congress to regulate commerce among the several States.

A. Whether or not a State taxing statute interferes with interstate commerce is a question of fact.

B. Without reference to decided cases, it is apparent on the facts that the tax at bar does not interfere with interstate commerce, because its burden is identical whether the goods are delivered from within or without the State.

POINT II.

The tax at bar is indistinguishable on the facts and in practical effect upon commerce from the "use taxes" recently sustained by this Court.

POINT III.

A consideration of the decisions of this Court indicates that in order to maintain equality between interstate and intrastate commerce, the Court has insisted that, while interstate commerce must pay its way, it may not be subjected to a greater burden, or to the danger of a greater burden, than local commerce.

In discussing the cases, the distinction between those relating to regulatory statutes and those relating to purely taxing statutes like that at bar must be borne in mind.

A. While interstate commerce is not exempt from State taxation, discriminatory taxes are clearly invalid.

B. Taxes of such a nature that, if valid, they might with equal right be imposed by several States, merely because interstate commerce is being done, subject interstate commerce to a burden of cumulative taxation not borne by local commerce, and are void.

(1) *The case of Robbins v. Shelby County Taxing District is illustrative of all of the vices found in State statutes invalidated by the Court under the Commerce Clause.*

(2) *A tax imposed upon a local activity, or imposed on an interstate transaction before the interstate movement has commenced or after it has come to rest, is valid because it cannot be imposed in more than one State.*

POINT IV.

The tax at bar is valid under the decisions of this Court because it does not subject interstate commerce to a greater burden, or to the danger of a greater burden, than would result if no interstate commerce were involved.

A. The tax is imposed upon the transfer of possession for use or consumption, a local event which can take place in only a single State.

B. The tax is imposed not upon the seller but upon buyers local to New York who cannot be taxed in any other State.

C. A tax upon a purchaser-consumer is not a tax upon interstate commerce in any event: the purchaser for consumption is not engaged in interstate commerce.

D. The imposition by another State of a tax on the seller upon the same transaction would not impose a burden of multiple taxation "merely because the commerce is being done", since such a tax could also be imposed upon local sellers.

POINT V.

Practical, social and economic considerations require that the tax at bar be sustained.

POINT I:

A State taxing statute can be invalidated under the Commerce Clause only if it subjects interstate commerce to such a burden as is tantamount to an interference with the power of Congress to regulate commerce among the several States.

The taxpayer claims that this tax violates the provision of the Constitution conferring upon Congress the power "to regulate Commerce * * * among the several States * * *." (Art. 1, Sec. 8, Cl. 3.) As this clause does not in terms limit the taxing power of the States, it is obvious that this can be so only if, as a matter of fact, the tax violates its purposes and intent.

The purpose of this clause was largely to prevent the States from favoring domestic industry as against the industries of other States, either by seeking to impose burdensome regulations, or by erecting tariff barriers, or by other forms of regulation or taxation, and thus stifling the growth of a national economy based upon the principle of free trade among the States (*Baldwin* v. *Seelig*, 294 U. S. 511, 523 [1935]). The evils of local tariff barriers, as well as of the attempts of the various States to exact tribute from the goods of otner States while passing through their borders, were very much in the minds of the framers of the Constitution; for they were fully aware of the many examples of those evils presented not only by the acts of the various States under the Articles of Confederation, but by contemporary Europe, and were determined to prevent their continuance in this country. The wisdom of their decision has been overwhelmingly demonstrated by the results.

At the same time, it was not the purpose of the Commerce Clause to interfere with the right of States to impose taxes to meet their own needs. As Alexander Hamilton said in the Federalist, No. XXXII:

> "I am willing here to allow, in its full extent, the justness of the reasoning which requires that the individual States should possess an independent and uncontrollable authority to raise their own revenues for the supply of their own wants. And making this concession, I affirm that (*with the sole exception of duties on imports and exports*) they would, under the plan of the convention, retain that authority in the most absolute and unqualified sense; and that an attempt on the part of the national government to abridge them in the exercise of it, would be a violent assumption of power, unwarranted by any article or clause of its Constitution." (Italics ours.)

In *Gibbons* v. *Ogden*, 9 Wheat. 1 (1824), the first case to invalidate a State statute under the Commerce Clause, Chief Justice Marshall stated that the clause did not limit the power of the States to tax but only their power to regulate interstate commerce, thus implying that only a tax which was in purpose or effect an attempt to regulate interstate commerce could be held invalid (p. 10):

> "In imposing taxes for State purposes, they are not doing what congress is empowered to do. * * * When, then, each government exercises the power of taxation, neither is exercising the power of the other. But, when a State proceeds to regulate commerce with foreign nations, or among the several States, it is exercising the very power that is granted to congress, and is doing the very same thing which congress is authorized to do. There is no analogy, then, between the power of taxation and the power of regulating commerce."

It is our contention that these principles form the basis of all the decisions of this Court dealing with State taxes under the Commerce Clause.

Direct attempts to regulate, except when justified under the police power or by the consent of Congress, have, of course, always been outlawed. But here we are dealing not with a regulatory statute but with a taxing statute. Taxing statutes, the effect of which is to place undue burdens upon the introduction of the goods of other States, or which in any other manner interfere with the free flow of interstate commerce, have likewise been condemned under the Commerce Clause. But on the other hand, taxing statutes which do not subject interstate commerce to a greater burden, or to the danger of a greater burden, than would result if interstate commerce were not involved, have invariably been upheld. The function of the Commerce Clause is to maintain equality between interstate and intrastate commerce. It does not entitle interstate merchants to a "free ride" at the expense of their local competitors; nor does it permit them to carry on their business without paying any part of the expense of the local governments that protect the various phases of their activities.

A. Whether or not a State taxing statute interferes with interstate commerce is a question of fact.

It is evident from a mere statement of this proposition that its application must be based upon factual rather than legal considerations. The Commerce Clause does not in terms limit the taxing power of States. It is only because the Court has found that in certain instances certain statutes as a matter of fact interfered with the power of Congress to regulate commerce that such taxing statutes have been invalidated.

It follows that each statute must be judged upon its own facts. To seek to determine whether or not one taxing statute constitutes an unconstitutional regulation of or interference with interstate commerce by citing formulae alleged to have been laid down by the Court in passing upon another, which may have presented an entirely different state of facts, will inevitably lead to wholly improper and unjustified results. And so this Court has consistently held.

> "No formula has yet been devised by which it can be determined in all cases whether or not such a tax [affecting interstate commerce] is valid, and, applying the repeated declaration of this court, in the cases cited and in many others, * * * the question is inherently a practical one, depending for its decision on the special facts of each case * * *"
>
> *Hump Hairpin Co.* v. *Emmerson*, 258 U. S. 290, 295 (1922).

> "'every case involving the validity of a tax must be decided upon its own facts'; and if the tax purports to be laid upon a subject within the taxing power of the State, it is not to be condemned by the application of any artificial rule but only where the conclusion is required that its necessary operation and effect is to make it a prohibited exaction."
>
> *Kansas City Ry.* v. *Kansas*, 240 U. S. 227, 233 (1916), quoting from *Baltic Mining Co.* v. *Massachusetts*, 231 U. S. 68 (1913).

The constitutional principle involved is comparable with that developed in the intergovernmental immunity tax cases. There again, the taxes are not expressly prohibited by the Constitution. Their validity or invalidity depends solely upon an analysis of the facts. Is the tax in fact an

interference by one government with the lawful governmental activities of the other?

> "• • • the only possible basis for implying a constitutional immunity from state income tax of the salary of an employee of the national government or of a governmental agency is that the economic burden of the tax is in some way passed on *so as to impose a burden on the national government tantamount to an interference by one government with the other in the performance of its functions.*" (Italics ours.) *Graves* v. *New York ex rel. O'Keefe*, 306 U. S. 466, 481 (1939).

So, here, the only possible basis for implying a constitutional immunity from State tax is that the tax in some way imposes a burden on interstate commerce tantamount to an interference by the State with that commerce. That is a question of fact.

B. Without reference to decided cases, it is apparent on the facts that the tax at bar does not interfere with interstate commerce, because its burden is identical whether the goods are delivered from within or without the State.

On its face, the contention that the tax at bar burdens interstate commerce seems a little far-fetched. The City, in effect, has said to all persons who come to its markets for the purpose of purchasing goods: "You shall pay a tax of 2% of the purchase price on anything (except certain exempted articles) which you buy in the City." The purchaser pays the same tax, whether the coal which he acquires was stored in Pennsylvania or New York. In both cases the sale may have been preceded by an interstate shipment; in both cases the tax is the same; in both cases the incidence of the tax is on a person whose only

part in the transaction was to order, pay for, and obtain possession of the coal in the City of New York from a seller who there offered the coal for sale.

How can such a tax constitute an interference with interstate commerce?

A simple illustration will make it abundantly clear that it cannot. Let us assume that commerce is still being conducted as it used to be not many centuries ago: in the public market place where sellers offer their wares for sale and where all prospective purchasers come in to buy. Obviously, a City would have the power to impose a tax upon all persons who come into this market to buy, based upon the value of their purchases. Into this market come merchants from all over the country offering their wares for sale. The purchaser pays the same tax upon goods produced by his local neighbor as he does upon goods brought from across the continent. Does the imposition of such a tax have any bearing or influence upon him as he goes "shopping" in the market? Is he any more likely to buy the goods of his neighbor than those of the stranger on account of the imposition of such a tax?

Similarly, what difference does it make to the seller? The goods brought in by the "stranger from afar" stand upon exactly the same footing, so far as this tax is concerned, as those of the local merchant. True, he may have been taxed by his home State or even by the various States which he traversed on his way to the market. But, as we shall show more clearly hereafter, under the rulings of this Court he can have been subjected only to such taxes as were either imposed upon local events in the other States, or apportioned according to the proportion of his business done in such States. His local competitor is equally subject to taxes of this kind imposed by the

State of the market place, so that, even from this standpoint, they stand on an equal footing.

Bringing this illustration up to date: What difference does it make whether the merchant brings the actual goods to the market place with him, or whether he sells from samples, delivering his goods from his warehouse, factory or mine, after he has found a purchaser? Again the purchaser, so far as this tax is concerned, will not be influenced by the question of where the warehouse, factory or mine may be located. Even though he may insist upon the product of a particular named factory or mine, it is immaterial whether that factory or mine is located in upstate New York or in Pennsylvania. His sole concern is to get the particular product which he wants, at the lowest price. This tax has no bearing whatever on those considerations.

On the other hand, if the tax at bar is held void, the effect upon commerce becomes immediately apparent. No local merchant will make any sales at all if similar goods are offered by his competitors from other States; for every purchaser will pass him by to seek the vendor whose goods are free from tax.

Such a result is repugnant to every principle of equality between the citizens of the several States inherent in our Federal system.

If exemption from this tax constitutes a subsidy to interstate at the expense of local commerce, it follows that its imposition, resulting inevitably in complete equality, cannot be a burden upon interstate commerce.

POINT II.

The tax at bar is indistinguishable on the facts and in practical effect upon commerce from the "use taxes" recently sustained by this Court.

We have seen that upon a simple basis of factual analysis, without regard to any particular legal theories, it is apparent that the tax at bar does not interfere with or in any way affect the course of interstate commerce. Again before taking up the legal theories involved in this problem, let us compare the factual situation presented by this case with that recently passed upon by this Court in the California use tax cases.

What difference is there between this tax and the California so-called "use taxes" sustained by this Court in the recent cases of *Felt & Tarrant Mfg. Co.* v. *Gallagher* (306 U. S. 62 [1939]), *Southern Pacific Co.* v. *Gallagher* (306 U. S. 167 [1939]), and *Pacific Telephone & Telegraph Co.* v. *Gallagher* (306 U. S. 182 [1939])? In each the tax is imposed upon a purchaser for consumption and in each the tax is measured by the purchase price and payable at the time of the purchase. The following tabular comparison shows the factual identity of the two taxes:

California Tax	New York City Tax
1. The tax is imposed on the purchaser at retail of merchandise purchased for consumption and not for resale.	1. The tax is imposed on the purchaser at retail of merchandise purchased for consumption and not for resale.
2. The tax is a given percentage of the sales price.	2. The tax is a given percentage of the sales price.

California Tax	New York City Tax
3. The tax is paid by the purchaser at the time of the sale.	3. The tax is paid by the purchaser at the time of the sale.
4. The vendor is directed to collect the tax and to state and charge it separately, and is forbidden to absorb the tax, all under pain of criminal penalties.	4. The vendor is directed to collect the tax and to state and charge it separately, and is forbidden to absorb the tax, all under pain of criminal penalties.
5. The tax is collected by the vendor, who files the returns.	5. The tax is collected by the vendor, who files the returns.
6. If the tax is not collected by the vendor, it is payable directly by the purchaser to the taxing official.	6. If the tax is not collected by the vendor, it is payable directly by the purchaser to the taxing official.
7. The tax law requires the vendor to insure payment of the tax if he fails to make the collections from the taxpayer.	7. The tax law requires the vendor to insure payment of the tax if he fails to make the collections from the taxpayer.

Thus, factually, the two taxes are identical. How, then, can one interfere with interstate commerce, while the other does not?

Our adversaries will no doubt argue that one is called a "use" tax and the other a "sales" tax; that the taxable event in one is described as "the exercise of any right or power * * * incident to the ownership of the property" other than resale (Cal. Laws of 1935, ch. 361, as amended by Laws of 1937, chs. 401, 671 and 683), whereas in the other the taxable event is the "transfer of title or possession or both" for any purpose other than resale.

But this is a difference in words, not a difference in substance. As was recently stated by this Court in *Southern Pacific Co.* v. *Gallagher* (*supra*, p. 177):

> "State taxes upon national commerce or its incidents do not depend for their validity *upon a choice of words* but upon the choice of the thing taxed." (Italics ours.)

A comparison of the respective statutory definitions of "use" and "sale" makes it evident that "the thing taxed" is identical: the California levy, like the tax at bar, is in fact imposed upon purchases for consumption.

The California law defines "use" as follows:

> "'Use' means and includes the exercise of any right or power over tangible personal property incident to the ownership of that property" except sales of property in the regular course of business (Sec. 2[b]).

The New York City definition of "sale" in so far as relevant to the case at bar is as follows:

> "The word 'sale' * * * means any transfer of title or possession or both * * * for a consideration" (Sec. 1[e]).

In *Southern Pacific Co.* v. *Gallagher, supra,* the Court upheld the California tax as applied to the sale and delivery of goods to the purchaser across State lines, even though the goods were consumed in interstate commerce immediately after their receipt by the purchaser. In short, the tax was imposed upon the transfer of the property to the railroad company in California. The New York City sales tax is imposed upon precisely the same event—the transfer of the coal to the purchasers in New York City.

Both the California and the New York taxes are imposed upon the consumer, based upon his acquisition of property for consumption and measured by the purchase

price. The New York tax is as much a "use" tax as the California tax, and the California tax is as much a "sales" tax as the New York tax. Both are taxes on the consumer, both require collection by the vendor, and both are otherwise identical in substance and procedure.

The New York tax, identical in substance with the California tax, can hardly be said to violate the Commerce Clause on the sole ground that the statute describes the tax in different words or by a different name than does the California statute.

That the difference in name (or even, if it be so considered, the difference in substance), between the two statutes is of no legal consequence is evident from the recent decision of this Court in *Graybar Electric Co.* v. *Curry* (308 U. S. * [Nov. 6, 1939], affirming, Ala. , 189 So. 186 [1939]). In that case this Court sustained a tax, collected by the seller from the purchaser of goods ordered and delivered from another State, under a statute denominated the "Alabama Sales Tax Act" and imposed upon the "business of selling at retail". There may be some differences between the exact methods of doing business in that case and this. Nevertheless, in each a tax was imposed upon a purchaser for consumption of goods imported across State lines, and in each the statute was denominated a "sales tax". What then becomes of the alleged distinction between a "use tax" and a "sales tax" imposed upon a purchaser?[1]

As we shall show hereafter, the particular tests applied by the Court in supporting the validity of the "use"

[1] In this connection, see the penetrating paper by Professor Thomas R. Powell of the Harvard Law School, *Business Taxation and Interstate Commerce*, Proc. Nat. Tax Assn., 30th National Conference (1937), pp. 337-359.

taxes are in every respect equally applicable to and equally met by the tax at bar. For the present we are content to rest our argument upon a factual comparison. Upon that analysis it is clear that *this* taxpayer could be compelled to pay *this* tax upon *these very transactions*, had they taken place in California, under the California use tax statute. How can the imposition of the tax become an unconstitutional burden on interstate commerce, when imposed in New York City under the New York City sales tax law?

It is true that if the New York tax be held void, interstate commerce will flow more freely in New York than in California, for obviously every New York purchaser will seek to buy goods only from those vendors who are able to store their goods in another State and make shipment across State lines. If it be the purpose of the Commerce Clause to subsidize interstate commerce to the point of destroying local business, then indeed this tax should be held invalid. But certain it is that if it be sustained, interstate commerce will be no worse off in New York than it is in California. No New Yorker will favor interstate shipments less because the tax is called a "sales" tax, and is described (in a statute which he has never seen) as being imposed upon his acquisition of the property for consumption, than he would if the tax were described as a "use" tax and imposed upon his receipt and retention of the property for consumption.

It takes more than dialectics to change the course of interstate commerce.

POINT III.

A consideration of the decisions of this Court indicates that in order to maintain equality between interstate and intrastate commerce, the Court has insisted that, while interstate commerce must pay its way, it may not be subjected to a greater burden, or to the danger of a greater burden, than local commerce.

In the previous Point we sought to demonstrate that the tax at bar was indistinguishable upon the facts from the "use" tax cases recently sustained by this Court. If we are correct in that contention, there is no need for further discussion.

If it be thought that the tax involved in this case is distinguishable, then it becomes necessary to consider the tax as an original proposition and discuss it from the standpoint of basic principles. For we know of no decided cases other than the "use" tax and *Graybar* cases which deal with a tax imposed by his own State upon a purchaser of goods for consumption, measured by the sales price of the goods. Let us turn to the cases, and determine what basic principles applicable to the facts at bar have been laid down by the Court.

In discussing the cases, the distinction between those relating to regulatory statutes and those relating to purely taxing statutes like that at bar must be borne in mind.

As we have already stated, the Commerce Clause itself does not in terms limit the taxing power of the States. It

merely confers upon Congress the power to regulate interstate commerce. Obviously, a State statute seeking in terms to regulate that commerce would be unconstitutional.

For example, a statute compelling a foreign corporation seeking to do an exclusively interstate business to submit a financial statement and a list of its stockholders and officers before its application for a license to do business in the State would be considered, has been held to be an unconstitutional regulation of commerce (*International Textbook Co.* v. *Pigg*, 217 U. S. 91 [1910]). Where, as in that case, the fee required for obtaining such a license was imposed not for the general purposes of obtaining revenue, but rather in order to defray the expenses of filing and regulation, the problem is a fairly simple one. The power to grant or withhold a franchise or license imports the power to impose terms and conditions upon its exercise: that is to say, "to regulate." As a State cannot regulate interstate commerce (except within a limited field, not here relevant) it cannot require a franchise or permit for the right to engage in it.

But a more complicated situation arises when the fee for obtaining the franchise is substantial, and in excess of the amount required for merely carrying out the purposes of administering the franchise statute itself. For then the exaction becomes in part a revenue measure, or tax, and we are confronted with two separate problems in determining the validity of the statute: the pure question of regulation, and the question of whether or not the tax constitutes a burden upon interstate commerce. It is of great importance to bear this distinction in mind whenever cases involving a corporate franchise or license tax imposed upon persons or corporations doing an exclusively interstate business are considered.

In considering whether or not a taxing statute having no regulatory features violates the Commerce Clause, we believe that the underlying concept is that equality between interstate and intrastate commerce must be maintained. In applying this concept, two cardinal principles, which were laid down in the earliest of the Commerce Clause cases, underlie all the decisions of this Court:

> (1) No State may impose a tax which subjects interstate commerce to a greater burden, or to the danger of a greater burden, than would result if interstate commerce were not involved.
>
> (2) Interstate commerce must pay its way.

In applying these principles the Court has found only two basic types of taxes which offend the Commerce Clause: (a) Taxes actually discriminating against interstate commerce, and (b) Taxes which are in effect discriminatory because they subject interstate commerce to the danger of cumulative tax burdens not borne by intrastate commerce, merely because the commerce is being done.

In the following pages we propose to trace in broad outline the development of the law on this subject, touching on some of the milestones in order to indicate that, at least on the basis of factual analysis, the Court has never varied from these principles.

A. While interstate commerce is not exempt from State taxation, discriminatory taxes are clearly invalid.

Statutes which apply only to products sold in interstate commerce are obviously invalid because they are discriminatory. The earliest taxes invalidated by the Court involved just such discrimination (*Brown* v. *Maryland*,

12 Wheat. 419 [1827]; *Ward* v. *Maryland,* 12 Wall. 418 [1870]; *Welton* v. *Missouri,* 91 U. S. 275 [1875]; *Cook* v. *Pennsylvania,* 97 U. S. 566 [1878]; *Webber* v. *Virginia,* 103 U. S. 344 [1880]; *Walling* v. *Michigan,* 116 U. S. 446 [1886]).

Such cases, of course, have no application whatever to the case at bar in which the statute applies alike to goods sold from local warehouses and to goods shipped across State lines.

That a tax which does not discriminate against interstate commerce and does not subject the foreign merchant to greater burdens of taxation, or to the possibility of greater burdens than are borne by the local merchant, will be sustained, was recognized by the Court in one of the first commerce cases it considered: *Woodruff* v. *Parham* (8 Wall. 123 [1868]).

In that case this Court sustained a local law of the City of Mobile, Alabama, imposing a tax, *inter alia,* upon all sales at auction and sales of merchandise within the City. Woodruff, an auctioneer, sold goods, some of which were products of States other than Alabama, and claimed that he was not required to pay a tax on such sales. The Court, after overruling the dictum in *Brown* v. *Maryland, supra,* that imports from other States were completely immune, said (pp. 139-140):

> "We are satisfied that the question, as a distinct proposition necessary to be decided, is before the court now for the first time.
>
> But, we may be asked, is there no limit to the power of the States to tax the produce of their sister States brought within their borders? and can they so tax them as to drive them out or altogether prevent their introduction or their transit over their territory?

> The case before us is a simple tax on sales of merchandise, imposed alike upon all sales made in Mobile, whether the sales be made by a citizen of Alabama or of another State, and whether the goods sold are the produce of that State or some other. There is no attempt to discriminate injuriously against the products of other States or the rights of their citizens, and the case is not, therefore, an attempt to fetter commerce among the States, or to deprive the citizens of other States of any privilege or immunity possessed by citizens of Alabama. But a law having such operation would, in our opinion, be an infringement of the provisions of the Constitution which relate to those subjects, and therefore void."

In the very next case decided by it, *Hinson* v. *Lott* (8 Wall. 148 [1868]), the Supreme Court applied the principle so announced. A taxpayer there complained of a State law taxing the introduction of liquors into the State for purposes of sale. The Court said that such a statute standing by itself would undoubtedly violate the Constitution, but pointed out that the statute also imposed a tax at exactly the same rate upon all liquors manufactured within the State. The Court held, therefore, that inasmuch as the act merely subjected imported articles "*to the same rate of taxation which similar articles pay that are manufactured within the State, we do not see in it an attempt to regulate commerce, but an appropriate and legitimate exercise of the taxing power of the States.*" (Italics ours.)

The principle that interstate commerce must pay its way is likewise well expressed in *Woodruff* v. *Parham*, *supra*. The Court there describes the injustice that would result if immunity from State taxation should apply to all

interstate transactions, whether or not it placed a burden upon them (p. 137):

> "The merchant at Chicago who buys his goods in New York and sells at wholesale in the original packages, may have his millions employed in trade for half a lifetime and escape all state, county, and city taxes; for all that he is worth is invested in goods which he claims to be protected as imports from New York. Neither the State nor the city which protects his life and property can make him contribute a dollar to support its government, improve its thoroughfares or educate its children. The merchant in a town in Massachusetts, who deals only in wholesale, if he purchase his goods in New York, is exempt from taxation. If his neighbor purchase in Boston, he must pay all the taxes which Massachusetts levies with equal justice on the property of all its citizens."

Thus, since the earliest decisions on this subject, the Court has recognized that the primary function of the Commerce Clause, in so far as its effect on taxing statutes is concerned, is to maintain equality between local merchants and the merchants of other States.

B. Taxes of such a nature that, if valid, they might with equal right be imposed by several States, merely because interstate commerce is being done, subject interstate commerce to a burden of cumulative taxation not borne by local commerce, and are void.

The principle laid down in *Woodruff* v. *Parham*, *supra*, seems both logical and simple. A local law is unobjectionable even though it be imposed on goods imported from another State, if it does not place any greater burden upon the sale of those goods than is placed upon the sale of

similar goods delivered from a point within the State. Goods brought from Pennsylvania should stand in neither a better nor a worse position when they reach the New York market than goods brought from "upstate".

At first blush it would appear that the only question involved is whether a statute by its terms discriminates against interstate commerce. But unfortunately the practical application of the rule is not as simple as that. Thus, in one of the earliest cases in which this Court held a State taxing statute invalid as violative of the Commerce Clause, the tax, on its face, was apparently non-discriminatory.

In *Case of the State Freight Tax* (15 Wall. 232 [1872]), the Court held invalid a statute of the State of Pennsylvania which imposed a selective tax at a flat rate of so much per ton upon all freight transported in the State. The tax in terms applied alike to interstate and intrastate shipments.

But it was not apportioned to the mileage over which the freight was carried. Thus, the carrier had to pay the same tax whether the transportation took place wholly within the State or between Pennsylvania and points in other States. If Pennsylvania could impose such a tax, every State through which the freight was transported might, with equal right, impose a similar tax upon the same freight. In spite of its non-discriminatory appearance, the Court held the tax invalid, saying (p. 280):

> "* * * for if one State can directly tax persons or property passing through it, or tax them indirectly by levying a tax upon their transportation, every other may, and thus commercial intercourse between States remote from each other may be destroyed * * *."

This was the first of a series of cases resulting from a growing local antagonism towards the rapid expansion of the "vested interests" as represented by the railroad, telegraph, and express companies. Repeated attempts were made by various States either to hamper their development or to exact tribute from them for the benefit of the local taxpayers. But the Court, relying upon the Commerce Clause, was astute to prevent all such attempts (*Western Union Tel. Co.* v. *Texas*, 105 U. S. 460 [1881]; *Pickard* v. *Pullman Southern Car Co.*, 117 U. S. 34 [1886]; *Philadelphia & Southern S. S. Co.* v. *Pennsylvania*, 122 U. S. 326 [1887]; *Leloup* v. *Port of Mobile*, 127 U. S. 640 [1888]; *Norfolk & Western Railroad Co.* v. *Pennsylvania*, 136 U. S. 114 [1890]; *McCall* v. *California*, 136 U. S. 104 [1890]).

Most of these taxes were flat taxes or license fees, such as that invalidated in the *Case of the State Freight Tax*, *supra*, imposed directly upon the conduct of interstate transportation or communication. Others were unapportioned gross receipts taxes selectively imposed on transportation or communication companies.

Because none of these taxes was apportioned to the mileage or business done in the State, they would, if sustained, subject interstate business to the danger of similar taxation by other States. Local businesses, on the other hand, could be subjected to only one tax.

Thus far under this subheading we have discussed cases dealing with transportation or communication companies. The danger of multiple taxation is perhaps most readily apparent in cases of that type. The activity taxed, being of an ambulatory nature necessarily reaching into several States, it is inevitable that, without the protection of the Commerce Clause, it would be subject to cumulative exactions by the several States.

At about the same period of expansion in the industrial and commercial life of the country which resulted in these local attacks upon transportation and communication companies, there arose a similar local antagonism towards "foreign" travelling salesmen, or drummers seeking to sell goods produced in other States by house to house solicitation. The natural instinct to protect the local merchants asserted itself. The legislators showed great ingenuity in seeking to devise taxing methods which would restrict these activities without appearing expressly to discriminate against them. Nevertheless, wherever the Court found from a factual analysis, that discrimination was either the true purpose or the practical result of the statute, the tax was invalidated.

For example, there appears to have been a growing business, originating in the northern States, of sending drummers to sell pictures and picture frames to the housewives in certain southern States. Various statutes to penalize these sales were thrown out, either because it appeared on the face of the statute that it was directed at the foreign goods, or because the tax was so imposed as to fall as a practical matter more heavily upon those goods than upon those of local merchants (*Brennan* v. *Titusville*, 153 U. S. 289 [1894]; *Caldwell* v. *North Carolina*, 187 U. S. 622 [1903]; *Dozier* v. *Alabama*, 218 U. S. 124 [1910]; *Davis* v. *Virginia*, 236 U. S. 697 [1915]).

So, also, the Court invalidated various hostile tax statutes aimed at other products of non-resident manufacturers (*Welton* v. *Missouri*, 91 U. S. 275 [1875], and *Norfolk & Western Ry. Co.* v. *Sims*, 191 U. S. 441 [1903], sewing machines; *Asher* v. *Texas*, 128 U. S. 129 [1888], and *Stockard* v. *Morgan*, 185 U. S. 27 [1902], stationery; *Crenshaw* v. *Arkansas*, 227 U. S. 389 [1913], ranges; *Rogers* v. *Arkansas*, 227 U. S. 401 [1913], buggies).

Quite apart from the apparent intent of the statutes discussed in these cases to discriminate against interstate commerce, they were subject to the objection that they were in fact direct attempts to regulate. For most of the cases dealt with license taxes imposed upon all persons desiring to do business within the State. As we saw at the outset of this discussion, the principles involved in cases of that kind are different from the principles presented by pure taxing statutes.

Another group of cases involving these same mixed considerations is presented by the cases outlawing attempts by States to require foreign corporations doing an exclusively interstate business to pay a corporate franchise tax.

The rationale of these cases is well stated in *Crutcher* v. *Kentucky* (141 U. S. 47, 57 [1891]):

> "To carry on interstate commerce is not a franchise or privilege granted by the State; it is a right which every citizen of the United States is entitled to exercise under the Constitution and laws of the United States * * *".

The States have no power to impose conditions upon the doing of an exclusively interstate business by a foreign corporation (*Western Union Tel. Co.* v. *Kansas*, 216 U. S. 1 [1910]; *Pullman Co.* v. *Kansas*, 216 U. S. 56 [1910]). By the same token, corporate franchise taxes, which contain both tax and regulatory features, when imposed upon foreign corporations carrying on within the State an exclusively interstate business, are invalid even though apportioned to the receipts from business done in the State or to the capital employed (*Cheney Bros. Co.* v. *Massachusetts*, 246 U. S. 147 [1918]; *Alpha Cement Co.* v. *Massa-*

chusetts, 268 U. S. 203 [1925]; *Ozark Pipe Line Corp.* v. *Monier*, 266 U. S. 555 [1925]; *Puget Sound Co.* v. *Tax Commission*, 302 U. S. 90 [1937]).[1]

On the other hand, a taxing statute imposed upon a foreign person or corporation doing an exclusively interstate business may be perfectly valid, if properly apportioned, where it is not combined with any regulatory features (*United States Glue Co.* v. *Town of Oak Creek*, 247 U. S. 321 [1918]; *Underwood Typewriter Co.* v. *Chamberlain*, 254 U. S. 113 [1920]; *Bass, Ratcliff & Gretton* v. *State Tax Commission*, 266 U. S. 271 [1924]; *Atlantic Coast Line R. R. Co.* v. *Daughton*, 262 U. S. 412 [1923]).

The statute at bar is a pure taxing statute, free from all regulatory features found in franchise or license tax cases. In applying decisions of the Court to such a statute, we must beware lest we be misled by the language used by the Court in cases containing mixed features.

(1) *The case of Robbins* v. *Shelby County Taxing District is illustrative of all of the vices found in State statutes invalidated by the Court under the Commerce Clause.*

A leading case of this general type is *Robbins* v. *Shelby County Taxing District* (120 U. S. 489 [1887]). That case

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[1] The Court's view of the invalidity of corporate franchise taxes as applied to foreign corporations doing an exclusively interstate business was not reached without dissent. See the dissenting opinion of Mr. Justice Holmes in *Western Union Tel. Co.* v. *Kansas*, *supra*, concurred in by Fuller, C.J., and McKenna, J., and the dissents in *Pullman Co.* v. *Kansas*, *supra*, by the same Justices. Justice Brandeis dissented without opinion in *Alpha Cement Co.* v. *Massachusetts*, *supra*. For a criticism of the corporate franchise decisions, see T. R. Powell, *Contemporary Commerce Clause Controversies over State Taxation*, 76 U. of Pa. L. Rev. 773, 958, 962 (1928); Harding, Double Taxation of Property and Income (1933), 252 *et seq.* Compare *Stone* v. *Interstate Natural Gas Co.*, 103 F. (2d) 544, affirmed, 308 U. S. (Dec. 11, 1939).

typifies a statute which contains practically all the vices which have been found by this Court in outlawing various State taxing statutes.

As is apparent from a careful analysis of the facts, the tax imposed was (a) in fact discriminatory; (b) it was in the nature of an attempt by the State to regulate interstate commerce; and (c) it subjected that commerce to the danger of multiple taxation.

(a) The statute in that case imposed a license fee of $10 a week or $25 a month upon drummers not having a regular place of business within the State. While in terms applying equally to all such drummers, as a matter of obvious fact every drummer representing a local seller would have a fixed place of business within the State. The practical effect of the statute was the same as if it had been in terms directed solely at drummers selling the products of other States. As was well recognized by the Court, it was but a thinly disguised attempt to discriminate against interstate commerce (p. 498):

> "* * * They [the merchants of other states] can only sell goods in Memphis by the employment of drummers and by means of samples; whilst the merchants and manufacturers of Memphis, having regular licensed houses of business there, have no occasion for such agents, and, if they had, they are not subject to any tax therefor. They are taxed for their licensed houses, it is true; but so, it is presumable, are the merchants and manufacturers of other states in the places where they reside; and *the tax on drummers operates greatly to their disadvantage in comparison with the merchants and manufacturers of Memphis. And such was undoubtedly one of its objects.* This kind of taxation is usually imposed at the instance and

solicitation of domestic dealers, as a means of protecting them from foreign competition. And in many cases there may be some reason in their desire for such protection. But this shows in a still stronger light the unconstitutionality of the tax. It shows that it not only operates as a restriction upon interstate commerce, but that it is intended to have that effect as one of its principal objects. And if a state can, in this way, impose restrictions upon interstate commerce for the benefit and protection of its own citizens, we are brought back to the condition of things which existed before the adoption of the Constitution, and which was one of the principal causes that led to it." (Italics ours.)

(b) Furthermore, it is apparent that the statute was in effect an attempt by the State to regulate interstate commerce. It made it a misdemeanor for a drummer to operate in the State without obtaining a license, and provided further that the license, even though the monthly or weekly fee were paid, would be valid for a period of only three months. Presumably, this meant that the State reserved the right to refuse to renew the license. If it could refuse to grant a license to a foreign drummer at all, it could grant it upon conditions; that is to say, it could regulate his business of negotiating sales in interstate commerce.

(c) Finally, the tax in the *Robbins* case resembles that passed upon in *Case of the State Freight Tax, supra.* As we pointed out in discussing that case, the danger of multiple taxation is peculiarly apparent in transportation and communication cases, because the activity taxed is essentially ambulatory and of necessity must cross State lines. But the business of sending out salesmen to sell the product of one State throughout the markets of the

country is in fact no less ambulatory in character, and therefore no less subject to the danger of multiple taxation.

As the Court pointed out in comparing the position of the foreign seller and the local merchant: "they [the local merchants] are taxed for their licensed houses, it is true; but so, it is presumable, are the merchants and manufacturers of other states in the places where they reside * * *" (p. 498). That is to say, the foreign merchant pays a tax at his local place of business in addition to the license tax here in issue; whereas the local merchant pays only the one tax upon his local place of business.

The effect of the tax would be the same as that in *Case of the State Freight Tax:* a flat rate unapportioned to the amount of the business done, might be imposed by every State touched by his business of seeking to sell his goods in interstate commerce. This, we think, is the explanation of the statement so often quoted from the opinion in the *Robbins* case, reading as follows (p. 497):

> "* * * Interstate commerce cannot be taxed at all, even though the same amount of tax should be laid on domestic commerce, or that which is carried on solely within the state. This was decided in the case of *The State Freight Tax*, 15 Wall. 232. The negotiation of sales of goods which are in another state, for the purpose of introducing them into the state in which the negotiation is made, is interstate commerce."

That the Court did not intend to lay down a general rule that a local tax could not be imposed at all with respect to interstate sales is evident from the case of *Ficklen* v. *Shelby County Taxing District* (145 U. S. 1

[1892]), decided five years after the *Robbins* decision. There the Court upheld a statute imposing a tax upon brokers measured by their commissions earned in negotiating exclusively interstate sales.

The distinction between the *Ficklen* and *Robbins* cases is that in the latter, as a matter of factual analysis, the tax placed a hurdle in the path of the foreign vendor seeking to sell his goods within the State, by subjecting him to a multiple tax burden not borne by his local competitor, whereas in the *Ficklen* case the tax was imposed upon a local business man measured by his gross receipts from the business carried on by him, notwithstanding that those receipts constituted exclusively commissions earned in negotiating interstate sales. He could not be taxed on those commissions in another State. It is obvious from a factual analysis that the burden of this tax was the same whether the sales upon which the commissions were earned by the local broker were sales in interstate commerce or strictly local sales.[1]

(2) *A tax imposed upon a local activity, or imposed on an interstate transaction before the interstate movement has commenced or after it has come to rest, is valid because it cannot be imposed in more than one State.*

This Court has always sustained taxes imposed upon any local activity as long as it could in some way be separated from the purely ambulatory activity of transportation, communication, or interstate selling (*American Mfg. Co.* v. *St. Louis*, 250 U. S. 459 [1919]; *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250

[1] See illuminating discussion of the *Robbins* case by William B. Lockhart, in *The Sales Tax in Interstate Commerce*, 52 Harv. L. Rev. 617 (1939).

[1938]; *Coverdale* v. *Arkansas-Louisiana Pipe Line Co.*, 303 U. S. 604 [1938]; *Gregg Dyeing Co.* v. *Query*, 286 U. S. 472 [1932]). The rationale of these decisions is that the tax is imposed either before the commerce has begun or after it has come to an end.

It is sometimes said that this rationale constitutes one of the basic tests in determining whether or not a tax is valid. We submit that a consideration of the facts in these cases shows that the moment at which interstate commerce begins or ends is important not for its own sake so much as because it forms a convenient test for determining whether or not the tax is of such a nature that it can be imposed in every State which the commerce touches. This again is particularly well illustrated in the case of taxes on transportation and communication across State lines. If an unapportioned tax is levied on an activity which is exclusively related to interstate movement, there is nothing to prevent it, if it be valid at all, from being imposed wherever that activity takes place. There is nothing to tie the tax down to any particular locality. So also in cases dealing with selling in interstate commerce: If the tax is imposed upon phases of the transaction exclusively related to the interstate activity, there is nothing to prevent it, if it be valid at all, from being imposed wherever that activity takes place. But when the tax is imposed in whole or in part upon some phase of the activity or transaction which is local in nature, so that it can take place only in a single State, the tax has always been sustained. See *Ficklen* v. *Shelby County Taxing District*, *supra*, and the use tax cases, *supra*.

In other words, the ultimate question to be determined is not whether the commerce has commenced or ended, but

whether the tax is one which can be imposed in more than one State.

The doctrine of multiple taxation, of course, finds its clearest and most effective expression in the recent cases, such as *Western Live Stock* v. *Bureau of Revenue, supra, Coverdale* v. *Arkansas-Louisiana Pipe Line Co., supra,* and *Southern Pacific Co.* v. *Gallagher, supra,* on the one hand, where the tax was held valid because, being attached to a local activity, it could be imposed in only one State; and *Adams Mfg. Co.* v. *Storen* (304 U. S. 307 [1938]) and *Gwin, White & Prince, Inc.* v. *Henneford* (305 U. S. 434 [1939]), on the other, where the tax was held void because, being imposed solely on an ambulatory phase of the activity it could, if valid, be imposed with equal right by every State which the commerce touched.

These cases have been so recently decided, however, that we think it would be superfluous to burden the Court with any extensive discussion of their facts or meaning. Suffice it to say that in our judgment they have effectively cleared away any doubts as to the true basis upon which State taxing statutes will be invalidated, which may have grown out of the various confusing factual situations heretofore discussed, and have reiterated and restated with clarity and precision the underlying doctrine for which we here contend: that a taxing statute is valid if it does not in fact discriminate against interstate commerce and does not in substance subject it to the danger of multiple taxation.

POINT IV.

The tax at bar is valid under the decisions of this Court because it does not subject interstate commerce to a greater burden, or to the danger of a greater burden, than would result if no interstate commerce were involved.

We think we have shown that, in applying the ultimate test of equality between interstate and local commerce, the Court has found only two types of taxes which, as a matter of factual analysis, violate its principles: (1) Discriminatory taxes, and (2), Taxes of such a nature that, if valid, they could be imposed with equal right in several States, merely because interstate commerce is being done.

We assume that our adversaries will agree that the tax at bar does not fall within the first category. It is not discriminatory in its terms; it is imposed alike upon all goods purchased within the State, wherever they may have been located at the time the sale was negotiated. The goods of the foreign merchant stand upon an equal footing in the markets of New York with the goods of the local merchant. The taxpayer pays the same tax, whichever goods he buys.

But no doubt our adversaries will advance the argument that the tax is an unapportioned tax upon interstate commerce, which can be imposed with equal right in every State which the commerce touches; in other words, they will invoke the rule of multiple taxation.

As we have further observed in discussing the decided cases, the rule of multiple taxation can be stated in a number of different ways. The Court, in applying it, has

frequently disposed of a case by merely showing that the tax was "not imposed on interstate commerce"; or that it was imposed upon a "taxable moment" separate from the commerce; or that it was imposed before the commerce had commenced or after the goods had "come to rest"; or that it was imposed upon a "local activity". In our view these statements do not represent separate or independent concepts or rules under the Commerce Clause. They present short cuts to a factual determination of whether or not multiple taxation may result.

Let us consider the tax at bar from the standpoint of these short cuts.

A. The tax is imposed upon the transfer of possession for use or consumption, a local event which can take place in only a single State.

The tax here at bar is not such a tax as might with equal right be imposed by any other State. The taxable event is the transfer of the goods in New York, for use and consumption. Under the Sales Tax Law, only local transfers are taxed and no tax is imposed in any case where delivery takes place outside the City (Sales Tax Regulations, Art. 94). The State enabling act forbids any tax unless the transaction taxed both originated and was consummated within the City of New York (New York Laws of 1934, ch. 873, sec. 1). By amending the remittitur to make clear that all State questions are eliminated (R. 158), the Court of Appeals has in effect held that the tax at bar as applied to this respondent fully satisfies these statutory limitations. Thus, as applied at bar, the tax is imposed upon a transaction both originating and consummated in New York City (See *Wiloil Corporation* v. *Pennsylvania*, 294 U. S. 169, 174 [1934]).

Whether or not the transfer of the goods for consumption is an integral part of an interstate sale, it is essentially a local event (*Utah Power & Light Co.* v. *Pfost*, 286 U. S. 165 [1932]). Consequently it is not an event which can be taxed in any other State (*Coverdale* v. *Arkansas-Louisiana Pipe Line Co., supra; Ficklen* v. *Shelby County Taxing District, supra*).

From the standpoint of multiple taxation the tax is identical with one imposed before interstate commerce has commenced, such as a tax on manufacturing (*American Mfg. Co.* v. *St. Louis, supra*), or upon storage or the withdrawal from storage (*Edelman* v. *Boeing Air Transport, Inc.*, 289 U. S. 249 [1933]). Similarly it is identical with taxes imposed immediately after the interstate commerce has terminated (*Minnesota* v. *Blasius*, 290 U. S. 1 [1933]; *Southern Pacific Co.* v. *Gallagher*, 306 U. S. 167 [1939]).

This is the rationale relied upon in supporting taxes upon an identical state of facts in the recent "use tax" cases. As we have shown in Point II, *supra*, every argument made in support of those taxes is equally applicable to the tax at bar.

B. The tax is imposed not upon the seller but upon buyers local to New York who cannot be taxed in any other State.

Quite apart from the local nature of the taxable event, there is another reason why this tax cannot be imposed in more than one State: The taxpayer is not the seller, but the local purchaser. He is subject to tax only if he obtains

possession of the goods in the City of New York, for use or consumption.

It is evident that no State other than the consumer's State has any power to impose any tax upon the purchaser for consumption. There are only two States which have any possible basis for taxing a retail purchase and sale in any event—the State of the buyer and the State of the seller. In the typical situation the purchaser is a non-resident of the vendor's State, is not engaged in business in the vendor's State, and does not come into the vendor's State either to take delivery or possession or for any other purpose. He carries on business in his own State, where the order is solicited, the goods are received and title is transferred. It is apparent, therefore, that the seller's State has no jurisdiction to tax the purchaser upon these sales. Because of this fact no State, so far as we know, has even attempted to impose a sales tax upon purchasers in other States. In New York City both the State enabling act authorizing the tax and the taxing law itself expressly forbid taxing such transactions (Laws of 1934, ch. 873, as amended; *Matter of Gunther's Sons* v. *McGoldrick*, 279 N. Y. 148 [1938]).

The power of a State to tax persons or corporations is based upon three considerations: The person taxed may be a local resident, in which case he may be taxed upon his income wherever its source, and upon his property within the State (*Lawrence* v. *State Tax Commission*, 286 U. S. 276 [1932]). Or, even though a non-resident, he may be taxed upon any property which he has within the State (*New Orleans* v. *Stempel*, 175 U. S. 309 [1899]; *Minnesota* v. *Blasius*, *supra*). Finally, a non-resident may be taxed upon any local activity carried on

within the State (*Shaffer* v. *Carter*, 252 U. S. 37 [1920]; *Yale & Towne Mfg. Co.* v. *Travis*, 252 U. S. 60 [1920]). Unless one of these factual situations exists, a State has no power to tax (*Conn. General Life Insurance Co.* v. *Johnson*, 303 U. S. 77 [1938]). Upon no basis, therefore, does the vendor's State have jurisdiction to tax the purchaser (*Curry* v. *McCanless*, 307 U. S. 357 [1939]).

If it be argued that a purchaser who obtained the goods for use or consumption in another State could be taxed upon such use or consumption in such other State, the answer is that our tax is imposed only where delivery is made within the State. If the goods are delivered at the place of consumption in another State, there is no tax. Of course if, after having acquired possession in this State, the purchaser later moves to another State and takes the goods with him, he cannot complain if he is again taxed upon the possession of the same goods. The purchaser in *Felt & Tarrant Mfg. Co.* v. *Gallagher*, *supra*, might decide to move his business to another State and take his comptometers with him. Nothing would prevent the other State from imposing another use or property tax upon him there. Such multiplication of taxes bears no relation whatever to the interstate nature of the sale. It would arise equally if the taxpayer had purchased the goods from a local seller, and later took them into another State. The Constitution is not violated because the cumulative burden, if any, is not imposed "merely because interstate commerce is being done" (*Western Live Stock* v. *Bureau of Revenue*, *supra*).

C. A tax upon a purchaser-consumer is not a tax upon interstate commerce in any event: the purchaser for consumption is not engaged in interstate commerce.

It is a little difficult to see any relationship between the statute here involved and those in which the doctrine of multiple taxation was relied upon as the basis of outlawing the tax. In all of those cases the taxpayer was one engaged in making a living either from selling goods in interstate commerce (*Adams Mfg. Co.* v. *Storen, supra; Gwin, White & Prince, Inc.* v. *Henneford, supra*), or from carrying on interstate transportation or communication (*Case of the State Freight Tax, supra; Fisher's Blend Station* v. *State Tax Comm.*, 297 U. S. 650 [1936]). So, also, the flat license taxes outlawed as violating the Commerce Clause were imposed upon persons engaged in the business of making a profit either out of negotiating sales in interstate commerce (*Robbins* v. *Shelby County Taxing District, supra*), or of carrying on interstate transportation or communication (*Pickard* v. *Pullman Southern Car Co., supra; Leloup* v. *Port of Mobile, supra*).

But in the present case the taxpayer, so far as the incidence of this tax is concerned, is not engaged in the business of making a profit out of interstate commerce at all. He is merely a purchaser for consumption. Is the housewife who goes to the nearest market to buy her household supplies engaged in commerce or business? Or the customer who buys a meal at a restaurant? True, many taxpayers such, for example, as the respondent in the companion case of *McGoldrick* v. *Compagnie Generale Transatlantique*, intend to consume the goods which they purchase in their business, but this does not mean that the act of buying constitutes engaging in business.

The word "commerce", according to Webster's New International Dictionary, means: "Business intercourse; esp., the exchange or buying and selling of commodities on a large scale between different places or communities; extended trade or traffic." The synonyms given are "trade" and "traffic." In other words, commerce means engaging in certain kinds of business. But the tax at bar is not intended to be imposed upon business but upon purchasing for consumption. A purchaser for resale is engaged in business; but he is expressly exempted from this tax. He would be subject to a gross business tax or to an income tax or to a sales tax imposed upon him as the seller on the resale of his goods; but not upon his purchases.

As we have seen throughout the foregoing discussion, any tax upon one engaged in the business of trading for profit must be carefully examined to see that it does not impose a burden upon so much of his business as may be interstate. But no such dangers enter into the consideration of a tax upon a purchaser for consumption, not only because his is a local activity and he himself a local individual, but because he is not engaged in commerce at all. The Commerce Clause has no application to such a tax as that at bar.

D. The imposition by another State of a tax on the seller upon the same transaction would not impose a burden of multiple taxation "merely because the commerce is being done", since such a tax could also be imposed upon local sellers.

As we have seen, the precise tax involved in this litigation cannot be imposed by more than one State. It is

imposed upon a local event which cannot take place in another State, and furthermore, it is imposed upon a taxpayer who himself is local to the State of New York.

If it be said that the vice of the tax is that it might be imposed upon the goods in another State, or upon the sale of the goods by the seller in another State, and that, therefore, a succession of taxes by different States upon the same goods might accumulate, the answer is that such cumulative taxation has never been held unconstitutional. Thus, a tax upon the manufacture or storage or release from storage of goods in another State is valid because that tax is based upon an activity local to such other State (*American Mfg. Co.* v. *St. Louis, supra; Gregg Dyeing Co.* v. *Query, supra; Nashville C. & St. L. Ry.* v. *Wallace*, 288 U. S. 249 [1933]). The reason is that such multiplication of taxes does not arise merely because interstate commerce is being done. Interstate commerce is not subjected to a greater burden than local commerce.

Let us consider taxes upon the seller. That an *unapportioned* gross receipts tax upon the seller cannot be imposed in other States, has been already decided by this Court (*Adams Mfg. Co.* v. *Storen, supra; Gwin, White & Prince, Inc.* v. *Henneford, supra*).

An *apportioned* gross receipts tax upon the seller would not violate the principle of multiple taxation even though the present tax is sustained. Like the manufacturing and storage taxes, it would not subject interstate commerce to a burden "not imposed on local commerce" "merely because interstate commerce is being done" (*Western Live Stock* v. *Bureau of Revenue, supra*). For the City of New York itself might equally well and, in fact, does, impose just such a tax upon *local* sellers. In addition to the sales tax, as we have shown at page 5,

supra, the City of New York also imposes a gross business tax under which local sellers pay a tax based upon their total gross receipts, and interstate sellers pay an apportioned tax upon their receipts from interstate sales.[1]

As was pointed out by the New York Court of Appeals in discussing the relationship between the sales tax and the gross receipts tax as applied to utility companies in *Matter of Merchants Refrigerating Co.* v. *Taylor* (275 N. Y. 113, 124 [1937]):

> "Appellant contends that it is twice taxed on its gross receipts, once by the sales tax, and once by the utility tax. As pointed out by the City, the sales tax falls upon the purchaser while the utility tax falls upon the utility itself."[2]

Let us consider an illustration in order to make this proposition perfectly clear: Let us assume that the seller involved in this litigation has a place of business in New York and is subject to the New York apportioned gross receipts tax. Let us assume also that the State of origin, Pennsylvania, imposes a similar apportioned gross receipts tax on the seller. Presumably, adding the two proportions, the seller will pay one tax on the full amount of the receipts from the sale, apportioned between the two States. Quite apart from that, as a totally separate tax, the purchaser will pay a full tax on the purchase of the goods. Thus the Pennsylvania seller is in exactly the same position as the local seller, who pays the New York gross receipts tax on the *full* amount of his local sales, while the

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[1] Under the New York City business tax on gross receipts, interstate vendors pay only an apportioned tax determined by use of an allocation formula. New York City Business Tax Regulations, Art. 238.

[2] No more than one tax on the gross receipts of a person selling goods or services may be imposed under the State enabling act. Laws of 1934, ch. 873, sec. 1.

purchaser of those goods similarly pays a tax on the same transaction. "Equality is the theme that runs through" the statutes. "When the account is made up, the stranger from afar is subject to no greater burdens as a consequence of ownership [or sale] than the dweller within the gates." (*Henneford v. Silas Mason Co.*, 300 U. S. 577, 584 [1937].)

POINT V.

Practical, social and economic considerations require that the tax at bar be sustained.

We have already shown that, tested by the basic principle underlying the Commerce Clause, the tax at bar is valid. This result is fortified by a consideration of the practical, social and economic results of such a decision.

The tax is levied upon and borne by the purchaser for consumption. A democratic tax system requires that taxes be paid by the electorate whose representatives impose it. The tax at bar was enacted by the elected representatives of the local buyers and is thus based upon democratic principles.

A tax on purchases of goods for consumption imposed by the purchaser's State, applied equally to goods bought from local merchants and from merchants filling orders from across State lines, prevents discrimination against local business. If this tax should be invalidated, merchants who keep their goods in warehouses across the Hudson River could put up a sign stating "BUY HERE AND AVOID THE SALES TAX." Such discrimination against local merchants is repugnant to every principle of equality between citizens and States which it was the purpose of the Constitution to establish and protect. If we are to

insure free trade between the States, we must not only protect interstate commerce from interference by local taxation but we must protect local commerce from any discrimination in favor of interstate commerce. The tax at bar "accommodate[s] itself to the double demand that interstate business shall pay its way, and that at the same time it shall not be burdened with cumulative exactions which are not similarly laid on local business." (*Western Live Stock* v. *Bureau of Revenue, supra*, 303 U. S. at p. 258.)

The protection and benefits which the buyer's State confers upon sellers, purchasers and sales to local purchasers are a complete economic justification for sustaining the tax. In soliciting the order, maintaining a local office and delivering the goods to the local purchaser, the seller receives the protection of the police, fire, sanitation and other departments of the City of New York. In enforcing payment, the seller makes use of the courts of this State. The purchaser is customarily either a resident of the State, protected by all its laws, and the beneficiary of its governmental services, or is engaged in business in the State and is similarly protected and benefited. A State conferring such benefits both upon the seller and the buyer has the strongest claim to imposing the tax at bar.

If this tax is held invalid on the basis of such artificial and uneconomic devices as the acceptance of orders outside the State, or contractual "requirements" that the goods be delivered from outside the State, etc. wholesale tax avoidance will be encouraged and induced. (See, for example, the elaborate paraphernalia employed by Felt & Tarrant Manufacturing Co., the respondent in one of the four companion cases here involved, which is obviously designed to avoid local taxes.) The elimination of tax

avoidance is of the greatest importance in accomplishing the purpose of placing interstate and intrastate commerce on a level of equality.

Finally, the adjustment of the revenue needs of the various States requires that consumers' sales taxes, paid by the purchaser and imposed by his State, be upheld. This Court has already sustained taxes upon manufacturing, mining and severance, measured by gross receipts from interstate sales, which provide the producing States with an important source of their revenue. The fiscal crisis which the States and localities have faced in recent years, in view of heavy relief rolls, is too serious and widespread to require discussion. To the manufacturing and producing States, the decisions point the way to gross receipts taxes. The non-producing States face a far more serious problem. During the depression an increasing number of sales taxes have been enacted. If this Court should invalidate the tax at bar, States and localities having similar taxes would be deprived of a similarly needed source of revenue as far as interstate business is concerned. New York City, which is both a great manufacturing center and the largest purchasing market in the country, has been forced to impose both a gross receipts tax on business and a consumers' sales tax in order to carry out its notable program of unemployment relief.

Conclusion.

It has been our purpose in this brief to demonstrate that, from whatever angle the problem is approached, the burden and effect of the tax at bar are the same, whether imposed upon a sale of goods produced or stored within or without the State.

It is our contention that if we are correct in that analysis, the tax must be sustained. For if its effect on interstate commerce is identical with its effect upon local commerce, it cannot violate the Commerce Clause.

The final order and judgment should be reversed and petitioner's determination confirmed.

December 18, 1939.

Respectfully submitted,

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(27430)

Supreme Court of the United States

No. 475. October Term, 1939.

JOSEPH D. McGOLDRICK, Comptroller of the City of New York,
Petitioner,

against

BERWIND-WHITE COAL MINING COMPANY.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK.

REPLY BRIEF FOR PETITIONER.

January 2, 1940.

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INDEX

PAGE

POINT I—Respondent's brief has narrowed the issue to a single question: Does the tax at bar subject interstate commerce to a burden, or to the danger of a burden, of multiple taxation not borne by local commerce? 1

POINT II—It is because the tax at bar is imposed upon a local purchaser and upon a local transfer of title and possession that it is not a tax of such a nature that, if valid, it could be imposed with equal right in any other State which the commerce touches and thus subject interstate commerce to a danger of multiple taxation not borne by local commerce..... 3

POINT III—The possible imposition by other States of different taxes upon different phases of the same transaction, or upon a different taxpayer, cannot affect the validity of the tax at bar..... 7

A. The burden of the imaginary taxes suggested by respondent, if they are valid in their own right, would exist independently of the tax at bar and would be equally borne by similar transactions of local origin..... 8

B. If the imaginary taxes suggested by respondent are not valid in their own right, a decision sustaining the tax at bar would not open the door to their imposition 11

POINT IV—The respondent's contention concerning the New York City personal property tax and the possible adoption of a use tax, has no bearing upon the validity of the tax at bar..... 14

PAGE

POINT V—By amending the remittitur, the Court of Appeals disposed of any contention that certain of the transactions at bar were not taxable under the State enabling act 17

CONCLUSION 19

Table of Cases Cited.

Adams Mfg. Co. *v.* Storen, 304 U. S. 307 (1938) 4, 11

Case of the State Freight Tax, 15 Wall. 232 (1872) 3

Coverdale *v.* Arkansas-Louisiana Pipe Line Co., 303 U. S. 604 (1938) 13

East Ohio Gas Co. *v.* Tax Comm., 283 U. S. 461 (1931) 13

Felt & Tarrant Mfg. Co. *v.* Gallagher, 306 U. S. 62 (1939) 2

Gwin, White & Prince, Inc. *v.* Henneford, 305 U. S. 434 (1939) 4, 11

Henneford *v.* Silas Mason Co., 300 U. S. 577, 587 [1937] 7

Matter of Atlas Television Co., 273 N. Y. 51 (1936) 2

Matter of Merchants Refrigerating Co. *v.* Taylor, 275 N. Y. 113 (1937) 2

Southern Pacific Co. *v.* Gallagher, 306 U. S. 167, 172 (1939) 7

Utah Power & Light Co. *v.* Pfost, 286 U. S. 165 (1932) 13

Wiloil Corporation *v.* Pennsylvania, 294 U. S. 169 (1935) 17

Other Authorities.

Personal Property Tax Law 16

Sales Tax Law 16

U. S. Constitution, Commerce Clause 16, 18

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REPLY BRIEF FOR PETITIONER.

POINT I.

Respondent's brief has narrowed the issue to a single question: Does the tax at bar subject interstate commerce to a burden, or to the danger of a burden, of multiple taxation not borne by local commerce?

The issues in this case have been very effectively, and we think satisfactorily, narrowed by the respondent's brief. As we read it, respondent is in entire agreement with the fundamental proposition presented in our principal brief, that the only question to be determined in this case is whether or not as a matter of fact the tax at bar subjects interstate commerce to a burden, or to the danger of a burden, of cumulative taxation not borne by local commerce.

In developing this proposition, the respondent propounds a number of legal theories with which we are

not in entire accord. For example, we do not agree with respondent's elaborate attempt to build up the theory that a sale of goods across State lines is an "integrated transaction" which cannot in any way be subdivided into its component parts; nor do we agree with the argument that respondent itself is a taxpayer, as distinguished from a tax collector.[1] Nor are we in entire agreement with respondent's development of the proposition that the transactions in question are "within the protection of the Commerce Clause", or that the burden of the tax is "direct" rather than "indirect".

But it seems to us that an extended discussion of these theories will not contribute to a solution of the true problem which all parties agree is presented by this litigation: Does the tax in question violate the Commerce Clause by exposing interstate commerce to the danger of a burden of multiple taxation not borne by local commerce? As we see it, it makes no difference, in resolving that question, whether we label the transaction as "integrated" or "separable", or say that the tax burden is "direct" or "indirect", or that the transactions are or

[1] Although respondent admits at page 16 of its brief that "the tax is imposed upon the buyer", nevertheless it seeks to argue, on the basis of the decision of the State Court of Appeals in *Matter of Atlas Television Co.*, 273 N. Y. 51 (1936), that as a matter of fact the obligation of the seller to collect the tax is the obligation of a taxpayer. As we pointed out in our principal brief (page 49) the Court of Appeals in *Matter of Merchants Refrigerating Co. v. Taylor*, 275 N. Y. 113 (1937), specifically rejected the claim of a seller that it was subject to double taxation because in addition to a gross receipts tax imposed upon it, it had to collect a sales tax from the purchasers of its product. In rejecting this contention the Court after pointing out that "the sales tax falls on the purchaser" said (at p. 124): "The *Atlas Television* case (273 N. Y. 51) did not hold that the sales tax is imposed on the vendor, but only that he is under a duty to pay the tax to the city, regardless of whether or not the vendor collects it from the purchaser." See also *Felt & Tarrant Mfg. Co. v. Gallagher*, 306 U. S. 62 (1939).

are not "transactions in interstate commerce." The particular words or phrases used in describing the transactions cannot change the course of interstate commerce.

Let us turn immediately, therefore, to a discussion of the question of whether or not the tax at bar subjects interstate commerce to a burden of multiple taxation not borne by local commerce.

POINT II.

It is because the tax at bar is imposed upon a local purchaser and upon a local transfer of title and possession that it is not a tax of such a nature that, if valid, it could be imposed with equal right in any other State which the commerce touches and thus subject interstate commerce to a danger of multiple taxation not borne by local commerce.

It is our contention that the rule of multiple taxation can be invoked to invalidate a tax only if it is of such a nature that if it were sustained, it would follow that an identical tax could be imposed upon the same phase of the same transaction in any other State where the same taxable activity took place. It is only under such circumstances that a particular taxing statute could subject interstate commerce to cumulative taxation by different States to which local transactions would not be subjected. And so this Court has invariably held. For example, in *Case of the State Freight Tax* (15 Wall. 232 [1872]), if the Court had sustained the imposition by the State of Pennsylvania of a tax of so much per ton upon all freight transported within the State, it would have been obliged to sustain an identical tax imposed upon the identical freight by every other State through which the freight was carried. Thus, goods from other States would be subjected to multiple taxation not

borne by goods shipped merely from one point within the State to another. So, also, a tax upon the gross receipts of one engaged in selling goods in interstate commerce could be imposed by every State in which any part of the activity was carried on. Hence the doctrine of *Adams Mfg. Co.* v. *Storen* (304 U. S. 307 [1938]), and *Gwin, White & Prince, Inc.* v. *Henneford* (305 U. S. 434 [1939]), that, unless such a tax is apportioned to the business done in each State, it is invalid.

In each of these situations, the tax was imposed upon an ambulatory phase of the transaction, which could not in any way be localized in a single State. That is why, if valid in the one State, the identical tax upon the identical taxpayer could be imposed in any State where the activity happened to take place. And that is why multiple burdens would result if the unapportioned tax were sustained in any State. A local seller would pay a gross receipts tax only in his own State, but an interstate seller might be subjected to gross receipts taxes in several States. Thus, the resultant rate of tax paid by the interstate seller on each sale would be greater than that paid by a local seller. If both the State of origin and the State of delivery imposed a gross receipts tax of 2% on the seller, the interstate seller would pay gross receipts taxes at the rate of 4% on each sale, whereas the local seller would pay the identical tax at a rate of only 2%. The result would be the same as if the local State imposed a rate of 4% upon interstate sellers and 2% upon local sellers. Hence, there would be discrimination against interstate commerce. This, and nothing more than this, is what is meant by the rule against multiple taxation.

That is why we have insisted upon the importance of the distinction between a tax on a buyer and a tax on a seller. In the former type, the tax is localized to the

buyer's State and cannot, because of the due process clause, be imposed in any other State. But if it is imposed upon the seller, who is engaged in selling his wares in several States and whose activities are therefore ambulatory in character, the tax may be of such a nature that, if valid, it could be imposed with equal right by each of the States in which some part of the seller's business takes place.

Similarly, the importance of the distinction between a tax on the transfer of title and possession and a tax on gross receipts is that the transfer of title and possession is a local event which can take place in only a single State and, therefore, can be taxed in only a single State, whereas the gross receipts of one engaged in an interstate business might be taxed in every State in which his business is carried on. For, again, the negotiation and consummation of interstate sales is a business of an ambulatory nature which, if it can be taxed at all, can be taxed wherever it is found. A gross receipts tax is imposed upon the activity as a whole, which, not being confined to any one locality, cannot be localized.

Respondent concedes that, because of the due process clause, the particular tax at bar cannot be imposed in any other State (Resp. Br., pp. 26, 41-42). But counsel urge that multiple taxation not borne by local commerce may result also from the imposition in another State of wholly different taxes upon different taxpayers and upon different taxable events, provided only that the burden of the tax falls upon the same general transaction. In support of this proposition, counsel have conjured upon various other kinds of taxes which, they claim, might be imposed upon different events and upon a different taxpayer by other States, and which would, according to counsels' contention, subject the transactions of sale involved in the

case at bar to a multiple tax burden not borne by similar transactions where no interstate shipment is involved.

But it is our contention that the taxes suggested by counsel, or any other similar taxes that might be imagined, are either invalid in themselves, in that they result in multiple taxation without regard to the existence or non-existence of the tax at bar, or, if valid, that they are of such a nature that identical taxes might be imposed with equal right by the State of New York upon similar phases of similar transactions taking place wholly within that State.

If the tax is imposed upon an ambulatory phase of the transaction, concededly it can be imposed in more than one State; but in that event the Court would hold it unconstitutional, unless apportioned. If, on the other hand, the tax is not imposed upon an ambulatory phase of the transaction, it can be imposed only in the single State where the activity taxed takes place. In that event it is valid; but its burden, if any, exists independently of the tax at bar. Furthermore, in either event the burden of any such tax would be borne equally by local commerce: an apportioned tax on the local proportion of an ambulatory phase of the transaction would be matched by an unapportioned tax upon the same features of a wholly local transaction; and a tax upon a local phase of a transaction in another State would be matched by a tax on the same phase of a transaction local to the State of New York.

In other words, we contend that it is only when the tax is of such a nature that if valid in one State an identical tax upon the identical property or event could be imposed with equal right in another State that the danger of multiple taxation arises. To find the correct answer to these conflicting contentions seems to us to be the only issue left in the case.

POINT III.

The possible imposition by other States of different taxes upon different phases of the same transaction, or upon a different taxpayer, cannot affect the validity of the tax at bar.

As examples of the kinds of taxes which the respondent says might be imposed by the States of Pennsylvania and New Jersey in such a way as to impose tax burdens upon these transactions not borne by similar transactions of local origin, respondent cites the following: (1) a possible tax on delivery to a carrier for shipment imposed by the State of Pennsylvania; (2) a possible tax on "transshipment" imposed upon all transshipments from rail to water carrier by the State of New Jersey; (3) a possible gross receipts tax imposed by the State of Pennsylvania.

At the outset it must be noted that none of these taxes has been imposed upon the respondent or anyone else in connection with the transactions involved in this case. An obvious answer to respondent's claim that such taxes might subject it to a discriminatory burden would seem to be found in *Southern Pacific Co.* v. *Gallagher* (306 U. S. 167, 172 [1939]):

> "It will be time enough to resolve that argument 'when a taxpayer paying in the state of origin is compelled to pay again in the state of destination.'" (Citing *Henneford* v. *Silas Mason Co.*, 300 U. S. 577, 587 [1937].)

The difficulty in discussing hypothetical taxes is that, in the absence of a concrete factual situation, it is not even possible to determine in advance whether they would be valid. For example, a tax on transshipment or on the delivery to a carrier for shipment would probably fall

within that category of taxes mentioned in our general discussion at pages 29 to 40 of our principal brief as opening the door to selective discrimination against interstate commerce, because of the selection, as the object of tax, of one of the very instruments of transportation. Such selective taxes must always be scrutinized with great care, lest they be hidden attempts to discriminate.[1] And as to a gross receipts tax, the principal burden of respondent's brief is that such a tax upon a sell" in interstate commerce, if unapportioned, is void.

Because of this uncertainty as to the validity of the suggested taxes, we are not quite clear whether it is respondent's contention that these hypothetical taxes might be imposed by the States of Pennsylvania and New Jersey in any event, or whether it is counsels' contention that, if this Court should hold the tax in this case valid, a precedent would be established which would compel the Court in a later case to validate the other taxes referred to, when imposed on the same transactions by the other States. Let us first examine these imaginary taxes on the theory that they could be imposed by the States of Pennsylvania and New Jersey regardless of the determination of the Court in this case.

A. The burden of the imaginary taxes suggested by respondent, if they are valid in their own right, would exist independently of the tax at bar and would be equally borne by similar transactions of local origin.

Obviously, if a tax could be imposed in Pennsylvania on the delivery of this coal to the carrier for shipment, or in New Jersey upon its transshipment, or if the State

[1] A general sales tax, on the other hand, contains no such selective feature.

of Pennsylvania could in any event impose a gross receipts tax upon the business done by this respondent in that State, regardless of whether or not the present tax is held valid, then those same taxes could be imposed in those States even if there were no New York City Sales Tax Law at all. If there were no such law, respondent's coal would still be subjected to those burdens in the other States and would still reach New York subject to those taxes which, according to respondent, would not be borne by goods of local origin. In other words, the burden of those taxes exists independently of the tax here in issue. How then can the imposition of this sales tax increase the burden upon these goods in any greater proportion than it increases the burden upon sales of goods of local origin? Clearly, if the relationship between interstate and intrastate commerce remains unaffected by the imposition of the tax, it cannot violate the Commerce Clause.

Similarly, if these taxes could be imposed in any event, regardless of the decision of this Court in this case, then their burden would be as great if the taxes involved in this litigation had been imposed under a tax modeled upon the California use tax. Yet the respondent insists that it would be perfectly proper for the City of New York to compel it to collect the very money involved in this litigation from the very purchasers involved in this litigation on account of the very purchases of coal involved in this litigation, and pay it over to the City, if the statute were called a use tax (Resp. Br., pp. 52-58). Surely, if these imaginary taxes conjured up by our adversaries would impose a burden of multiple taxation and a restriction upon the free flow of interstate commerce when imposed in addition to the tax here involved under the title "sales tax", interstate commerce would not be freed from these restrictive burdens by merely changing the name from "sales" to "use" tax.

But we think the short answer to this whole contention is that these taxes, if valid at all, might with equal right be imposed upon all similar transactions of local origin by the State of New York. Obviously, a tax upon delivery to a carrier for shipment, if valid at all, can be imposed as well by the State of New York upon goods shipped from Buffalo or from Staten Island, as by the States of Pennsylvania or New Jersey upon the goods at bar; and if New Jersey can impose a tax upon transshipment, so again can the State of New York upon any transshipment occurring within the State. Clearly, therefore, so far as these taxes are concerned the burden of multiple taxation, if any, is one to which local commerce may be equally subjected.

So also, as to an apportioned gross receipts tax imposed upon the respondent by the State of Pennsylvania, or even by the State of New Jersey: a similar gross receipts tax could be, and in fact is, imposed by the State of New York upon all local vendors. Accordingly, the multiple burden, if any, is borne equally by local commerce, and the transaction here involved would be no worse off than transactions involving sales of goods produced within the State.

But at pages 51 to 52 of their brief, counsel for respondent present an argument which, as far as we can make out, is based upon the proposition that the States of New Jersey and Pennsylvania could impose an *unapportioned* gross receipts tax upon this respondent on account of the very transactions involved in this case.

We quite agree that the imposition of such unapportioned gross receipts taxes upon this respondent in the States of Pennsylvania and New Jersey, particularly when added to a gross receipts tax imposed upon the respondent under the New York gross business tax, would subject

these transactions to a burden of multiple taxation not borne by local commerce. *That is just why this Court has held, in both the Adams and Gwin, White cases that such a tax would be unconstitutional.* Moreover, the cumulative tax burden resulting from the imposition of such a tax would not be caused by the tax at bar. It would exist whether or not the tax at bar were sustained, and whether or not there were any such tax as the tax at bar imposed within the City of New York at all. It would exist also if the sums of money involved in this case had been assessed under a use tax. Obviously, therefore, the danger of the imposition of such a tax, if such danger exists, cannot affect the validity of the tax at bar; for its danger is no greater whether that tax is imposed or not.

B. If the imaginary taxes suggested by respondent are not valid in their own right, a decision sustaining the tax at bar would not open the door to their imposition.

We cannot understand by what process of reasoning respondent reaches the conclusion that the States of Pennsylvania and New Jersey could impose unapportioned gross receipts taxes. Seven times in the three pages of their brief discussing this proposition, they refer to the *Gwin, White* case (Resp. Br., pp. 50-52). The only thing established by that case is that an unapportioned gross receipts tax upon one who sells goods in interstate commerce is unconstitutional.

At page 56 of their brief counsel say that if the Court sustains the tax at bar, it would "open the door" to the imposition of multiple taxes on the same transactions in other States. We assume, therefore, that the argument must be that if the Court should sustain the present tax, a precedent would be established which would be binding in subsequently passing upon an unapportioned

gross receipts tax imposed upon this seller by the State of Pennsylvania. If the present tax be sustained, then, we assume upon the basis of *stare decisis*, respondent contends that the Court will have to sustain a gross receipts tax imposed upon this respondent on account of these same transactions by the State of Pennsylvania. And presumably it is respondent's further contention that upon some similar theory, if the Court sustains the tax at bar it would have to sustain the other imaginary forms of taxation suggested by counsel.

But nothing is more fundamental than that a decision of the Court upholding one tax cannot create a precedent, or "open the door", for another tax unless the two taxes are identical in every respect. What identity in fact, in theory or in law is there between the tax involved in this case and an unapportioned gross receipts tax imposed by the State of Pennsylvania upon this respondent, or a tax upon delivery to a carrier in Pennsylvania, or a transshipping tax in New Jersey? How can it be seriously argued that if the present tax be held valid, then this Court in following the precedent thus established in this case, would have to uphold these other taxes?

We note that our adversaries cite no cases in support of any such proposition. We think the reason is obvious. Such cases as relate to the subject at all clearly sustain the proposition that a tax may be imposed upon any phase of an interstate transaction which is inseparably related to a local event, even though other taxes, upon the same transaction but not related to a local event, have been held invalid. There is no rule that, if a tax upon one phase of an interstate transaction is upheld, taxes upon any other phases occurring in other States must also be upheld. This Court has repeatedly drawn distinctions between a tax imposed upon an ambulatory phase of

an interstate transaction, which, unless apportioned, would subject interstate commerce to a danger of multiple taxation, and a tax upon some local phase, where, because the identical tax could not be imposed in any other State, it has been sustained (*East Ohio Gas Co.* v. *Tax Comm.*, 283 U. S. 461 [1931]; *Utah Power & Light Co.* v. *Pfost*, 286 U. S. 165 [1932]; *Coverdale* v. *Arkansas-Louisiana Pipe Line Co.*, 303 U. S. 604 [1938]). Certainly, the physical relationship between the transfer of title and possession of personal property and the interstate transaction is no closer than the physical relationship between the "taxable moment" found sufficient to sustain the tax in each of the cases just cited and the interstate commerce of which it was an "integral part".

It is apparent from a consideration of these cases that there is no substance whatever to the respondent's argument that the rule of multiple taxation presents a bar to the imposition of different taxes upon different phases of an "integrated transaction." It is only when a tax imposed upon some activity related to an interstate transaction is *not* tied down to some local event which can take place in only a single State, or to a local taxpayer who can be in only a single State, that the tax is of such a nature that, if allowed at all, it could be imposed with equal right by another State. That is the rule of multiple taxation, and it has no application whatever to the tax at bar.

POINT IV.

The respondent's contention concerning the New York City personal property tax and the possible adoption of a use tax, has no bearing upon the validity of the tax at bar.

Respondent sets forth the New York City personal property tax statute (Appendix B, Resp. Br.) and argues that the tax at bar should not be sustained because transactions of the type here involved may be taxed under the personal property tax law or, if the form of that statute is inadequate, by the adoption of a use tax modeled after the California statute (Resp. Br., pp. 55-58).

We know of no principle of constitutional law which requires this Court to invalidate a State taxing measure because the same result can be accomplished by an alternative legislative method validated in an earlier decision. Indeed, the very statement of such a proposition indicates that the statute under attack is open to no constitutional infirmity, for it tacitly concedes that the effect of the assessment at bar is not to impose a burden of taxation prohibited by the Commerce Clause. This Court has sedulously followed the salutary principle that it is the function of State legislative bodies alone, and not of this Court, to decide upon the proper methods of achieving legislative aims. So long as the assessment here sought to be imposed may concededly be collected under a statute named a "use" tax, it is obviously not within the province of this Court to decide that it cannot be collected because the City Council has termed it a "sales" tax. Certainly, this respondent would be no happier if the $176,703,89 involved in this litigation were assessed against

it under a use tax. The existence of the personal property tax law has no bearing on the validity of the assessment at bar.

Moreover, this contention conveniently overlooks the important fact that there are millions of dollars of taxes collected and assessments outstanding for the periods covered by the existing statutes which would be nullified. Indeed, if the tax at bar in the sum of $176,703.89 for the period December 10, 1934 to December 31, 1935, is representative of the respondent's business, the total liability of the respondent at bar alone for taxes collectible from its purchasers to date is nearly $1,000,000.

If the City of New York were to adopt the California system, sharp changes in the sales and personal property taxes and their administration would be necessitated, but there would be no change whatever in the burden of taxation affecting sales of goods shipped across State lines. The personal property tax law was designed primarily to cover New York City consumers who go outside the City to make their purchases, taking delivery there and thereupon bringing the merchandise into the City. The sales tax law was designed to tax all purchases in which delivery is made in the City, whether or not across State lines. This is of course reflected in the remittitur in the case at bar, which by resting the decision solely on federal grounds, affirms our contention that, so far as the local law is concerned, the transactions were intended to be taxed under the sales tax law.[1]

[1] In some instances, assessment may be made as to the same transactions under both laws, the personal property tax assessment acquiring validity only if the sales tax assessment fails.

The advantages of taxing purchases involving shipment across State lines under the sales rather than the personal property tax law are obvious. Collection from the purchaser is provided for only under the sales tax law (Appendix A, Appendix of Statutes, Sec. 2). Under the personal property tax law the owner files returns and pays the tax directly (Local Law No. 25 of 1934, Sec. 1, Resp. Br., p. 65, Appendix B). Because of the difficulties of maintaining administrative check or control over vast numbers of purchasers, the personal property tax is limited in coverage to articles of considerable bulk and value; there is an exemption for annual purchases not exceeding $100.[1]

Counsels' contention that New York City should be required by this Court to tax interstate sales under an amended personal property tax or a use tax law would serve only to disrupt the New York City system of taxation, without in the least altering the burden or effect of the tax on interstate commerce. So long as the tax at bar does not subject interstate commerce to a greater burden, or to the danger of a greater burden, of taxation than that borne by local commerce, it is valid whether called a "sales" tax or a "use" tax.

---

[1]There are other differences between the two statutes. The penalties under the personal property tax law are much higher than under the sales tax law (Sec. 15, sales tax law; Sec. 12, personal property tax law). The methods of review and contesting assessments differ under the two statutes (Secs. 7 and 9, sales tax law; Sec. 8, personal property tax law).

POINT V.

By amending the remittitur, the Court of Appeals disposed of any contention that certain of the transactions at bar were not taxable under the State enabling act.

Respondent argues that as to certain of the sales involved in this litigation, the delivery was in fact made outside the State, and that therefore the attempt to assess the tax violates the provisions of the enabling act (Resp. Br., pp. 9, 18).

The contract of the respondent with Austin, Nichols Company called for delivery "f.o.b. Deld. Mine" (Ex. 25, R. 139), and the contract with the New England Steamship Company called for delivery "f.o.b. cars Harsimus Pier, Jersey City, New Jersey" (Ex. 21, R. 130). It was the respondent's contention in the State courts that these delivery terms resulted in the passage of title and possession outside of New York City and that the sales were thus outside the scope of the State enabling act (Br., Point II, pp. 27-28). The petitioner's position was that these terms were price-fixing in nature, serving merely to fix the liability for freight charges, and that the taxpayer had not proved that they had any other significance (*Cf.* treatment by this Court in *Wiloil Corporation* v. *Pennsylvania*, 294 U. S. 169 [1935] of the term "f.o.b. Wilmington.") (Br., Point III, pp. 13-14).

In opposing the petitioner's motion to amend the remittitur in the Court of Appeals, the respondent in its brief particularly urged upon the Court that the assessment on the sales to these two companies was illegal under State law. It requested the Court to rule that "a non-

federal question of local state law also is presented as to the sales to two of the twenty purchasers" (Memorandum in Answer to Defendant-Appellant's Motion to Amend the Remittitur, p. 2). The Court of Appeals ruled against the taxpayer and provided in the remittitur that its judgment of affirmance was based "upon the sole ground that the City Tax Law, as here applied violates the Commerce Clause (Art. 1, sec. 8, Cl. 3) of the Constitution of the United States" (R. 158; 281 N. Y. mem. 94, 22 N. E. (2d) 764 [1939]).

We are aware that when an appellant comes before this Court asserting that a federal right has been denied him, the certificate of the State court that the federal question, *inter alia*, was passed upon, has no power to cure a patently defective record. But, where the federal right has been upheld against the contention that it did not exist, the Court's certificate that in effect it deemed all State questions too clear to require expression and so placed its decision on federal questions alone, ought to be conclusive.

Conclusion.

There is no dispute as to the right of the City, under the Constitution, to compel this respondent to collect the $176,703.89 here involved from the same purchasers on account of the same coal upon the sales of which the tax at bar was assessed.

The only dispute is whether this sum can be collected under a sales tax, or only under a use tax.

That there is neither reality nor substance to such a distinction is apparent from an examination of the arguments advanced to sustain it. For every "burden" which respondent suggests might result from the tax at bar, exists, if it exists at all, with equal force under a use tax.

The final order and judgment should be reversed and petitioner's determination confirmed.

January 2, 1940.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1939.

NO. 475

JOSEPH D. McGOLDRICK, Comptroller of the City of New York,
Petitioner,

against

THE BERWIND-WHITE COAL MINING COMPANY,
Respondent.

MEMORANDUM FOR RESPONDENT.

JOHN W. DAVIS,
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Supreme Court of the United States,

No. 475

OCTOBER TERM, 1939.

JOSEPH D. McGOLDRICK, Comptroller of the City of New York,
Petitioner,

against

THE BERWIND-WHITE COAL MINING COMPANY,
Respondent.

MEMORANDUM FOR RESPONDENT.

This case presents a question of the same general character as is presented in *McGoldrick* v. *Compagnie Generale Transatlantique* and *McGoldrick* v. *Felt & Tarrant Mfg. Co.*, Nos. 44 and 45 respectively on the current docket of this Court, cases in which the petitioner's applications for certiorari were granted. There are, however, certain material factual differences between the instant case and Nos. 44 and 45 which are favorable to the respondent herein and which make the instant case a stronger case for the taxpayer than either No. 44 or No. 45.

The instant case, like Nos. 44 and 45, arose under the New York City Sales Tax Law, and in the instant case, as in Nos. 44 and 45, the New York Court of Appeals held that taxes levied by the petitioner upon sales in interstate commerce were invalid "upon the sole ground that the City Sales Tax Law as here applied violates the commerce clause (Art. 1, Sec. 8, cl. 3) of the Constitution of the United States". Petitioner's applications for certiorari in Nos. 44 and 45 were granted on June 5, 1939, and on October 9, 1939, this Court, on petitioner's motion, deferred the argument in

those cases until December 4, 1939, or such time as the petitions for certiorari in the instant case and in the case of *McGoldrick* v. *A. H. DuGrenier, Inc.* (No. 474) shall have been acted upon.

We maintain that the decision of the court below is clearly correct. The record in the present case leaves no room for doubt (1) that the sales here involved constitute transactions in interstate commerce and (2) that the taxes imposed upon such transactions are direct and undue burdens upon interstate commerce. Indeed, the facts of record in the present case afford even stronger support for these conclusions than do the facts of record in Nos. 44 and 45. We therefore maintain that irrespective of whether this Court should decide to affirm or reverse the decisions of the New York Court of Appeals in Nos. 44 and 45, the decision of the New York Court of Appeals in the present case is sound and should not be disturbed.

Although we confidently assert that the decision of the court below is correct, we do not oppose the granting of certiorari for the following reasons:

The taxes involved in the present case cover only the period from December 10, 1934 to December 31, 1935. So long as the City of New York continues to take the position that the respondent and its customers are liable for the sales tax upon respondent's interstate sales, the litigation with respect to this question may be expected to continue. On the other hand, a decision of this Court in this case will set the matter permanently at rest.

If this Court should grant certiorari in this case, we respectfully urge that the case be set down for argument together with Nos. 44 and 45.

Respectfully submitted,

JOHN W. DAVIS,
MONTGOMERY B. ANGELL,
MARVIN LYONS,
Attorneys for Respondent.

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IN THE

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JOSEPH D. McGOLDRICK, Comptroller of the City of New York,

Petitioner,

—against—

THE BERWIND-WHITE COAL MINING COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK.

BRIEF FOR RESPONDENT.

JOHN W. DAVIS,
MONTGOMERY B. ANGELL,
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THE COURT PRESS, N. Y. C.

INDEX.

	PAGE
Opinions Below	2
Statement of Facts	2
The Coal Produced and Sold	3
The Tonnage Sold	3
The Contracts Covering the Sale of Coal	4
All Deliveries Are Made from the Mines; There Is No Storage in New York	5
The Necessity for Delivery from the Mines	7
The Method of Delivery	7
Deliveries outside New York City	9
The Purchasers Require Delivery from the Mines	9
The Taxing Statutes Involved	10
Construction by the New York Courts of the Taxes Imposed by Local Laws Nos. 20 and 25 as Amended	12
The Character and Incidence of the Taxes	12
The Character of the Seller's Liability under the Sales Tax Law	16
The Taxes Assessed in This Case	17
The Question Presented	17
Summary of Argument	19
Argument	20
I. The tax levied against respondent upon the sales here involved is a direct and undue burden upon interstate commerce in violation of the commerce clause of the Federal Constitution	20
A. The sales here involved are transactions in interstate commerce; interstate shipment was contemplated, required and made	27
B. The event upon which the tax is laid is an inseparable part of an integrated interstate transaction	36

PAGE

C. The tax is invalid as an undue burden upon interstate commerce because, if upheld, the interstate sales would be subject to the danger of multiple and cumulative tax burdens to which local transactions are not exposed 38

II. The use tax cases are clearly distinguishable from the present case 52

Conclusion 58

Appendix A: Summary of Pertinent Provisions of the Contracts Here Involved 59

Appendix B: Local Law No. 25 of 1934 as Amended by Local Law No. 13 of 1935 65

Table of Cases Cited.

Adams Mfg. Co. v. Storen, 304 U. S. 307 (1938), 22, 37, 39, 42, 43*n*, 45, 47, 48, 50, 51, 52, 56, 57

American Mfg. Co. v. St. Louis, 250 U. S. 459 (1919) ..23, 55

Banker Brothers Co. v. Pennsylvania, 222 U. S. 210 (1911) 23, 25, 30, 31, 32

Brennan v. Titusville, 153 U. S. 289 (1894) 37

Brown v. Maryland, 12 Wheat. 419 (1827) 22

Caldwell v. North Carolina, 187 U. S. 622 (1903) 31

Case of the State Freight Tax, 15 Wall. 232 (1872), 22, 40, 43*n*, 46

Cook v. Pennsylvania, 97 U. S. 566 (1878) 22

Crew Levick Co. v. Pennsylvania, 245 U. S. 292 (1917) .. 46

Davis v. Virginia, 236 U. S. 697 (1915) 37

Eastern Air Transport, Inc. v. South Carolina Tax Commission, 285 U. S. 147 (1932) 23

Edelman v. Boeing Air Transport, Inc., 289 U. S. 249 (1933) 23

PAGE

Felt & Tarrant Mfg. Co. v. Gallagher, 306 U. S. 62 (1939) 23, 52

Fisher's Blend Station, Inc. v. State Tax Commission, 297 U. S. 650 (1936) 22, 44

Graves v. New York *ex rel.* O'Keefe, 306 U. S. 466 (1939) 46

Graybar Electric Co. v. Curry, —— Ala. ——, 189 So. 186 (1939), 308 U. S. ——, 84 L. Ed. 97 (Nov. 6, 1939) 23, 25, 30, 33, 55*n*

Gwin, White & Prince, Inc. v. Henneford, 305 U. S. 434 (1939) 20, 22, 37, 38, 39, 42, 44, 46, 47, 48, 49, 50, 51, 52, 56, 57

Henneford v. Silas Mason Co., Inc., 300 U. S. 577 (1937) 23, 56

In re Lazaroff, 84 F. (2d) 982 (C. C. A. 2, 1936) 16, 45, 55*n*

Matter of Atlas Television Co., Inc., 273 N. Y. 54, 6 N. E. (2d) 94 (1936) 46, 45, 55*n*

Matter of Compagnie Générale Transatlantique (French Line) v. McGoldrick, 279 N. Y. 192, 18 N. E. (2d) 28 (1938) 2, 16

Matter of C. G. Gunther's Sons v. McGoldrick, 279 N. Y. 448, 18 N. E. (2d) 12 (1938) 16, 18

Matter of Felt & Tarrant Mfg. Co. v. McGoldrick, 279 N. Y. 678, 18 N. E. (2d) 311 (1938), *reargument denied*, 280 N. Y. 688, 21 N. E. (2d) 198 (1939) .. 16

Matter of Keslee, Inc. v. McGoldrick, 278 N. Y. 293, 16 N. E. (2d) 288 (1938) 16

Matter of Merchants Refrigerating Co. v. Taylor, 275 N. Y. 113, 9 N. E. (2d) 799 (1937) 16

Matter of National Cash Register Co. v. Taylor, 276 N. Y. 208, 11 N. E. (2d) 881 (1937), *cert. denied*, 303 U. S. 656 (1938) 2, 16, 24

Matter of Sears, Roebuck & Co. v. McGoldrick, 279 N. Y. 184, 18 N. E. (2d) 25 (1938) 16

PAGE

Matter of West Publishing Co. v. Taylor, 276 N. Y. 535, 12 N. E. (2d) 565 (1937), *cert. denied*, 303 U. S. 656 (1938) 16, 24

Monamotor Oil Co. v. Johnson, 292 U. S. 86 (1934) 23

Montgomery Ward & Co., Inc. v. Fry, 277 Mich. 260, 269 N. W. 166 (1936) 25

New York City v. Goldstein, 299 U. S. 522 (1937), ... 16, 45, 55*a*

Pacific Telephone & Telegraph Co. v. Gallagher, 306 U. S. 182 (1939) 23, 52

Philadelphia and Southern Steamship Co. v. Pennsylvania, 122 U. S. 326 (1887) 22

Puget Sound Stevedoring Co. v. State Tax Commission, 302 U. S. 90 (1937) 36, 37, 43*a*

Real Silk Hosiery Mills v. Portland, 268 U. S. 325 (1925) 37, 38

Rearick v. Pennsylvania, 203 U. S. 507 (1906) 31, 37

Robbins v. Shelby County Taxing District, 120 U. S. 489 (1887) 31, 37, 38, 46

Southern Pacific Co. v. Gallagher, 306 U. S. 167 (1939) 23, 52, 53, 54, 55

Superior Oil Co. v. State of Mississippi, 280 U. S. 390 (1930) 34, 35, 57*a*

Walling v. Michigan, 116 U. S. 446 (1886) 22

Ware and Leland v. Mobile County, 209 U. S. 405 (1908) 23, 30

Webber v. Virginia, 103 U. S. 344 (1880) 22

Welton v. Missouri, 91 U. S. 275 (1875) 22

Western Live Stock v. Bureau of Revenue, 303 U. S. 250 (1938) 22, 26, 39, 43*a*, 44, 50*a*, 56, 57

Williamsburgh Power Plant Corp. v. City of New York, 255 App. Div. 214, 7 N. Y. S. (2d) 326 (1938), *affd. without opinion*, 280 N. Y. 551, 20 N. E. (2d) 12 (1939) 12

Wiloil Corp. v. Pennsylvania, 294 U. S. 169 (1935), ... 23, 25, 30, 32

Table of Statutes Cited.

	PAGE
Laws of the State of New York, 1934, Ch. 873	10, 13, 18
New York City Local Law No. 9 of 1934	50*a*
New York City Local Law No. 17 of 1934	50*a*
New York City Local Law No. 20 of 1934 as amended by No. 24 of 1934	10, 11, 12, 15, 17, 36, 53, 56
New York City Local Law No. 25 of 1934 as amended by No. 13 of 1935	11, 12, 17, 52, 53, 58
New York City Local Law No. 32 of 1935	50*a*
New York City Local Law No. 29 of 1936	50*a*
New York City Local Law No. 22 of 1937	50*a*
New York City Local Law No. 20 of 1938	50*a*
New York City Local Law No. 103 of 1939	50*a*
New York City Business Tax Regulations, Art. 238	50*a*
Statutes of California, 1933, Ch. 1020	54*a*, 55*a*
Statutes of California, 1935, Ch. 361 as amended by Statutes of California, 1937, Chs. 401, 671 and 683	54*a*, 55*a*, 56, 58

Other Authorities.

Conflicting Interpretations of Retail Sales Tax Laws, by Neil H. Jacoby, 2 U. of Chicago L. R. 78 (1934)	25
Tax Systems of the World (7 Ed. 1938) and 1939 Supplement Thereto	24

IN THE

Supreme Court of the United States

October Term, 1939.

No. 475.

JOSEPH D. McGOLDRICK, Comptroller of the City of New York,
Petitioner,

—against—

THE BERWIND-WHITE COAL MINING COMPANY,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK.

BRIEF FOR RESPONDENT.

The case comes to this Court on a writ of certiorari granted on December 4, 1939 to review the judgment of the New York Court of Appeals (R. 159, amended R. 158) annulling petitioner's determination that respondent is liable for New York City sales taxes in the amount of $176,703.89, including penalties of $36,185.92 for the period from December 10, 1934 to December 31, 1935. The case originated with the issuance to respondent of a preliminary notice of deficiency (R. 13). Thereafter a hearing was had before petitioner's predecessor as Comptroller of the City of New York (R. 21), and upon the record made at that hearing the Comptroller made a final determination of a deficiency in tax in the amount of $140,517.97 and penalties in the amount of $36,185.92 (R. 21). Respondent thereupon made payment under

protest to the Comptroller of the sum of $176,703.89, which it was required to do in order to perfect its right to have his determination reviewed (R. 22-3). Upon review by the Appellate Division, First Judicial Department, of the New York Supreme Court, that court entered an order annulling the Comptroller's determination and ordering refund to respondent of the amount paid (R. 149). The judgment now here for review is the judgment of the Court of Appeals affirming the order of the Appellate Division.

Opinions Below.

The opinion of the Appellate Division (R. 150; reported in 255 App. Div. 961) annulling the Comptroller's determination is a memorandum opinion rendered on the authority of *Matter of National Cash Register Company* v. *Taylor*, 276 N. Y. 208, cert. denied, 303 U. S. 656, and *Matter of Compagnie Generale Transatlantique (French Line)* v. *McGoldrick*, 279 N. Y. 192 (one of the companion cases now before this Court). The Court of Appeals affirmed without opinion (R. 152; 281 N. Y. mem. 34, 22 N. E. (2d) 173 (1939)), but its remittitur was later amended to state that the order of the Appellate Division was affirmed "upon the sole ground that the City Sales Tax Law as here applied violates the Commerce Clause (Art. 1, Sec. 8, Cl. 3) of the Constitution of the United States" (R. 158; 281 N. Y. mem. 94, 22 N. E. (2d) 764 (1939)).

Statement of Facts.

Respondent, The Berwind-White Coal Mining Company, is a corporation organized in 1888 under the laws of Pennsylvania, having its main office in Philadelphia and a sales office in New York City.

For more than 40 years past it has been engaged in the business of producing bituminous coal from its own mines in Pennsylvania and selling such coal to consumers and dealers (R. 27, 28). The only mines owned by respondent are located in Somerset and Cambria Counties in Pennsylvania. It is from these mines that respondent supplies the requirements of its customers located in New York City (R. 28, 29).

The Coal Produced and Sold.

The mines owned by respondent in Pennsylvania cover two veins of coal called "B Seam" and "C Prime Seam" (R. 28). The coal produced from the B seam has been sold by respondent for the past 40 years under the trade name "Berwind's Eureka" and the coal produced from the C Prime seam has been sold under the trade name "Berwind's Standard C Prime" (R. 28). Respondent's mines in Pennsylvania are the only source of the coal sold by it under these trade names (R. 28, 29). The Eureka (B Seam) coal is superior in quality to the C Prime coal (R. 28) and is obtainable only from mines within an area of some 150 square miles in Pennsylvania (R. 68-9, 105). The B seam coal, on account of its physical, chemical and burning qualities, is particularly well adapted to use by the public utility and steamship companies as fuel in the generation of steam (R. 28-9). The C Prime coal, which comes from the same area, is sold to dealers and small industrial plants (R. 29).

The Tonnage Sold.

The annual tonnage sold by respondent to New York City customers is approximately 1,500,000 tons.

consisting of approximately 1,100,000 tons of Eureka coal to public utility companies, approximately 200,000 tons of Eureka coal to steamship companies and others, and approximately 200,000 tons of C Prime coal to dealers and industrial companies (R. 29). Sales to dealers are not here involved.

Of the twenty purchasers involved in this proceeding five are public utility companies, eleven are steamship companies, one is a ship repair company and three are industrial companies. The following table shows the receipts from sales during the period from December 10, 1934 to December 31, 1935 to the various classes of New York City customers excluding dealers (R. 109):

Public utility companies (Berwind's Eureka coal):	
Brooklyn Edison Co.	$2,467,164.83
New York Edison Co. and United Electric Light & Power Co.	2,038,109.29
Interborough Rapid Transit Co.	2,038,204.28
Williamsburgh Power Plant Corp.	696,400.96
Total to public utility companies	$7,239,879.36
Steamship companies (Berwind's Eureka coal)	266,822.05
Industrial companies (Berwind's C Prime coal)	31,238.68
Total	$7,537,940.09

The Contracts Covering the Sale of Coal.

All of respondent's contracts for the sale of coal to New York City customers are made in New York City (R. 76). All but a small portion of respond-

ent's sales are made pursuant to term contracts providing for delivery over a period of time, usually one year. The remaining sales are made pursuant to spot contracts covering orders for immediate delivery (R. 45-6). In all but two instances during the period here in question the contracts provided for delivery to the purchasers by barge alongside the purchasers' plants or steamships. The exceptions were the contracts with Austin, Nichols & Co., which provided for delivery to the purchaser on board cars at respondent's mines in Pennsylvania (R. 139), and the contracts with New England Steamship Company, which provided for delivery to the purchaser at Harsimus Pier, Jersey City (R. 130, 131). The subject matter of the contracts with 17 companies (including all the public utility and steamship companies) was Berwind's Eureka coal and the subject matter of the contracts with the remaining three industrial companies was Berwind's C Prime coal. All the contracts contained provisions clearly expressing the intention of the parties that the coal be shipped from respondent's mines in Pennsylvania. A summary of the pertinent provisions of the several contracts here involved is set forth in Appendix A at pages 59 *et seq., infra.*

All Deliveries Are Made From the Mines; There Is No Storage in New York.

Respondent fulfills all its contracts with New York City customers by direct shipment of the coal from its mines in Pennsylvania. This has been its invariable practice for the past 40 years and all deliveries during the period here in question were so made (R. 31-2, 58-9, 63-4). Respondent has never had any coalyards, warehouses or other facilities for the

storage of coal in New York (R. 30). Mr. Dunlap, the President of respondent, testified as follows (R. 30):

> "Q. Will you explain why the company has never had any such [storage] facilities? A. The conditions and character of our business do not require it, as we make deliveries direct to customers from our mines via the Pennsylvania Railroad and barges and tugboats to destination. They have the storage facilities necessary to protect their coal supply."

Mr. Savage, Purchasing Agent for New York Edison Company, one of the purchasers, testified as follows (R. 71):

> "Q. * * *, is storage coal as good in quality for the purpose of use in your plants as coal that comes directly from the mines, freshly mined coal? A. The freshly mined coal is better. Coal in storage depreciates in value in time.
>
> Q. Then you prefer to have coal come directly from the mines? A. Yes."

And at R. 91:

> "Q. Would not the storage facilities necessary to supply plants such as yours require a tremendous amount of space and investment? A. Yes.
>
> Q. And the coal delivered, if any such storage were maintained, the coal would have to be delivered to your plants by barge, wouldn't it? A. It would.
>
> Q. Do you know of any coal mines in the state of New York? A. I know of none.
>
> Q. And the coal kept in such storage would have to be brought in from outside the state? A. That is right.
>
> Mr. Baum: You know that many sellers of coal have coal stored here, don't you?

The Witness: I know that there is coal stored in the city of New York, but not in the quantities to take care of our requirements."

The Necessity for Delivery From the Mines.

The public utility customers of respondent require daily deliveries of coal in large quantities (R. 69). In 1934 and 1935 respondent delivered from 25,000 to 30,000 tons of coal per week to such companies (R. 61-2). Delivery of coal to the plants of the public utilities in the quantities required can be made only by water, since all such plants are on the waterfront and are constructed to receive coal only from the water side (R. 61). Deliveries of coal to steamships and to most of the industrial plants must also be made by water (R. 61).

In view of these conditions, and in order to assure the public utility companies and other large consumers of coal in New York City a steady supply of coal from the mines and to protect them against shortages and delays, respondent for the past 40 years has maintained its own delivery system; it has owned and still owns railroad cars, barges and tugboats, used in carrying the coal from the mines to the plants and steamships of its customers (R. 30, 31).

The Method of Delivery.

Respondent's regular practice in making deliveries of coal to purchasers in New York City is as follows:

The purchasers notify respondent by telephone at its New York office of their requirements, and the orders are transmitted by the New York office to the mines in Pennsylvania. The public utility companies notify the New York office on Thursday of each week of their requirements for the following week; the total tonnage requirements are computed

at the New York office and are immediately transmitted to the mines in Pennsylvania (R. 62-3).

The requirements of the steamship companies depend upon the arrival of steamships in New York harbor. Orders for coal to be delivered to particular steamships are received at the New York office well in advance of the scheduled arrival of the ships, and are transmitted to the mines (R. 62-3).

In transmitting the orders two days are allowed for mining the coal and five days are allowed for transportation. The coal is mined upon receipt of the orders (R. 63).

The coal is loaded on the railroad cars at the mines, and the cars are then hauled over the Pennsylvania Railroad to Harsimus Pier in Jersey City. Each car is accompanied by a waybill which designates by name or number the particular mine from which the coal was taken, the kind of coal, and the weight. Upon arrival at Harsimus Pier the coal is dumped from the cars into the barges; each barge is loaded for delivery to a particular purchaser pursuant to a particular order, and each barge load is covered by a bill of lading, delivered to the purchaser, designating the purchaser as consignee. Upon being loaded, the barges are towed to the purchaser's plant or steamship. Delivery to the purchaser is complete when the barge comes alongside the plant or steamship; the coal is unloaded into the plant or steamship by the purchaser (R. 64-5).

The payments for the coal by the purchasers are made by checks, which in some instances are sent directly to the Philadelphia office and in other instances are received at the New York office and transmitted to Philadelphia, where they are deposited (R. 102).

The foregoing practice was followed by respond-

ent in fulfilling all contracts requiring delivery in New York City during the period December 10, 1934 to December 31, 1935 (R. 64).

Deliveries Outside New York City.

There were two purchasers during the period here involved who took delivery outside New York City. The contracts with Austin, Nichols & Co. (Ex. 25, R. 139) required delivery on board cars at the mines and were actually fulfilled by delivery to that company on board cars at the mines in Pennsylvania (R. 53). The contracts with New England Steamship Company (Ex. 21, R. 130) required "delivery to be made to New England Steamship Company at Harsimus Pier, Jersey City" and were actually fulfilled by delivery to that company at Harsimus Pier, Jersey City (R. 44, 51).

The Purchasers Require Delivery From the Mines.

The purchasers here involved, all of whom had purchased coal from respondent for a number of years prior to 1934, were informed that the coal was produced by respondent from its mines in Pennsylvania, and that its practice was to make delivery by shipment from its mines (R. 30, 31, 47, 56-7).

With respect to the delivery practice, Mr. Savage, Purchasing Agent for New York Edison Company, testified as follows (R. 77):

> "Q. Does the fact that the Berwind-White Company has consistently maintained the delivery facilities that you have described and has delivered coal under the practice you have described have any bearing on your negotiation of contracts for the purchase of coal from them? A. That is the reason we continue to do business with them."

The Taxing Statutes Involved.

The authority of the City of New York to impose both the City sales tax and the City "property" or "use" tax is derived from the Enabling Act enacted by the New York State Legislature on August 18, 1934 (Chapter 873, Laws of the State of New York, 1934). The full text of the Enabling Act is printed in petitioner's Appendix of Statutes as Appendix B. The Enabling Act authorized any city of the State of New York having a population of 1,000,000 inhabitants or more to adopt local laws imposing any taxes "which the legislature has or would have power and authority to impose", but such taxes shall have application "only within the territorial limits of any such city". The Act expressly prohibited "the imposition of a tax on any transaction originating and or consummated outside of the territorial limits of any such city, notwithstanding that some act be necessarily performed with respect to such transaction within such limits." The act expressly contemplated the imposition of taxes "on account of tangible property actually located or income earned, or trades, businesses or professions carried on within such city, or on account of transfers, retail sales or other transactions actually made or consummated within such city."

Under the authority of the Enabling Act, the City of New York enacted on December 5, 1934 Local Law No. 20† imposing a tax of 2% upon the gross receipts from sales of tangible personal property sold at retail in New York City. Local Law No. 20 was amended by Local Law No. 24††, enacted December

† Published as Local Law No. 21 in the official compilation entitled "Local Laws of the Cities in the State of New York enacted during the year 1934".

†† Published as Local Law No. 25 in the official compilation.

28, 1934. On the same day (December 28, 1934) the City enacted Local Law No. 25† imposing a tax of 2% upon the purchase price of certain articles of tangible personal property situated or owned within the City of New York. The full text of Local Law No. 24 is printed in petitioner's Appendix of Statutes as Appendix A. The full text of Local Law No. 25, as amended in minor particulars by Local Law No. 13 of 1935, is printed in Appendix B to this brief at pages 65 *et seq., infra.*

The Sales Tax Law is entitled "Tax on Sales of Certain Properties and Rendering of Certain Services in the City of New York." Section 2, imposing the tax, provides that "there shall be paid a tax of two per centum upon the amount of the receipts from every sale in the city of New York of: (a) Tangible personal property, sold at retail," etc., and further provides that "receipts upon which the state of New York and city of New York are by virtue of the provisions of the constitution of the United States or otherwise without power to impose a tax, shall not be subject to tax hereunder." The vendor is required (§5) to make return of his receipts and of the taxes payable thereon, and is also required (§6) to pay such taxes to the Comptroller at the time of filing the returns. The vendor is further required (§2) to state and charge the tax separately from the sale price and is given the same right to collect the tax from the purchaser as if the tax were a part of the purchase price of the property. Where the vendor has failed to collect such tax, the purchaser is required to file a return with the Comptroller and to pay the tax to the Comptroller.

Local Law No. 25 as amended provides (§1) that "there shall be paid by the owner a tax of two per

† Published as Local Law No. 26 in the official compilation.

centum upon the value of the following-named articles of personal property situated or owned within the city of New York" [listing various items and classes of items of tangible personal property]. Section 3 provides that "such articles of personal property as are subject to such tax shall be evaluated for taxing purposes at the actual purchase price". Exemptions from the tax (§2) include articles purchased prior to January 1, 1935 and articles upon the receipts from sale of which the tax imposed by the Sales Tax Law is payable. The tax imposed by Local Law No. 25 as amended is complementary to the tax imposed by Local Law No. 20 as amended by No. 24.

Construction by the New York Courts of the Taxes Imposed by Local Laws Nos. 20 and 25 as Amended.†

The Character and Incidence of the Taxes.

The New York courts have made it perfectly clear that the sales tax imposed by Local Law No. 20 as amended is a tax upon the transaction of sale as distinguished from a tax upon ownership or use of the article by the purchaser, and that the complementary or compensating tax imposed by Local Law No. 25 is an excise tax upon the use by the purchaser of the article purchased. This construction of these statutes was urged by the City and was adopted by the Appellate Division, Second Department, and approved by the Court of Appeals in *Williamsburgh Power Plant Corp.* v. *City of New York*, 255 App. Div. 214, affirmed without opinion, 280 N. Y. 551. In that case, the validity of the tax imposed by Local Law No. 25 was challenged upon the ground that

† Local Law No. 20 of 1934 was amended by No. 24 of 1934; Local Law No. 25 of 1934 was amended by No. 13 of 1935.

it was imposed upon *transactions of purchase* consummated outside the City, such transactions being beyond the power of the City to tax under the Enabling Act. In upholding the validity of the tax the Appellate Division said (pp. 216-8):

"This Local Law No. 25 of 1934 is a complement to Local Law No. 21* of 1934, which imposed a two per cent sales tax. The two statutes are part of a general tax plan.

"Plaintiff says that Local Law No. 25 is invalid because the enabling act herein quoted expressly provides that the act shall not authorize the imposition of a tax 'on any transaction' originating outside the city. It resorts to various characterizations of the kind of tax imposed by Local Law No. 25. The precise name to be attached thereto is not vital. Only its true nature is material and the label is not conclusive. It is sufficient to note that the tax is an indirect tax, and to that extent it is an excise tax—a tax upon the consumption of or the opportunity to use property, rather than upon the property itself. A tax which is identical has been called a 'use' tax.

"The language which, plaintiff says, bars the enactment of Local Law No. 25 reads: 'This act shall not authorize the imposition of a tax *on any transaction* originating and/or consummated outside of the territorial limits of any such city, notwithstanding that some act be necessarily performed with respect to such transaction within such limits.'

"If the tax imposed is deemed to be upon a 'transaction' originating outside the city, the statute attacked may not be sustained. But plaintiff's argument ignores the sentence which follows the one just quoted. The sentence thus conjoined, so far as pertinent, reads: 'This act shall not au-

* Local Law No. 20 is published as No. 21.—[Rep.

thorize the imposition of a tax on a non-resident of such city or on account of any transaction by or with a non-resident of such city, *except when imposed without discrimination as between residents and non-residents, on account of tangible property actually located * * * within such city.*'

"It is true that tax laws are to be strictly construed, but strict construction does not permit the ignoring of explicit language. The last quoted sentence should be construed as its plain import requires—that the prohibition against the imposition of a tax upon any transaction outside the city does not preclude the levying of a tax 'on account of tangible property actually located * * * within such city,' because it is subject to a clear limitation. In other words, while the city may not impose a tax upon a transaction without its confines which concerns the sale of goods, the language in the last quoted sentence, by the exception contained therein, authorizes the levy of a tax 'on account of tangible property actually located * * * within such city;' that is, it authorizes a 'use' tax. It is well recognized that the taxing power may be exercised upon one or all the attributes of the ownership of property; that is, a tax may be levied on one attribute which relates to a transaction involving a purchase or sale, and in another instance a tax may be levied on the attribute of ownership which concerns the use of property as distinguished from the transaction which involves the acquisition of the property that enables the use. (*Henneford* v. *Silas Mason Co.*, 300 U. S. 577.) In the cited case statutory provisions substantially identical with those here involved were passed upon. The statute characterized a similar excise tax as a 'compensating tax' but the court called it a 'use' tax. There, as here, the use or compensating tax was a complement to another or sales tax in like amount, levied upon

purchases of property within the State of Washington, while the compensating tax was laid upon property which became located in the State of Washington, and, therefore, usable in that State as the result of a transaction or purchase without the State. The language of Cardozo, *J.*, is as pertinent to the tax here involved as to the one there under consideration. It was held that the so-called 'compensating tax was a use tax validly levied upon property which came to 'rest' within the State after the purchase transaction had been concluded elsewhere. This was because the property thus became part of the mass of property within the State and, therefore, subject to a tax upon its use. The claim that the tax was a mere subterfuge or pretense and was in fact and reality a tax upon the property purchased or the transaction had without the State, was rejected. This was on the theory that the separating, for taxing purposes, of the transaction of purchase from the act of locating the property within the State was within legislative competence; that the field of choice of the Legislature was so broad that a tax might be laid on any one or a few of the attributes of ownership. It was further held that the choice was for the Legislature and that the motives leading to the adoption of the tax were not a concern of the court, especially where the tax, apart from motives, would be otherwise lawful.

"The tax attacked, therefore, is a tax on 'use' and not a tax upon the 'transaction' or purchase, and the levying of such a tax by the city is authorized and not prohibited by the enabling act."

The sales tax imposed by Local Law No. 20 as amended by No. 24 is clearly a tax upon the transaction of sale as distinguished from a tax upon the use or ownership of the property after its acquisition by the buyer. *Matter of C. G. Gunther's Sons* v. *Mc-*

Goldrick, 279 N. Y. 148; *Matter of National Cash Register Co.* v. *Taylor*, 276 N. Y. 208, cert. denied 303 U. S. 656; *Matter of West Publishing Co.* v. *Taylor*, 276 N. Y. 535, cert. denied 303 U. S. 656; *Matter of Sears, Roebuck & Co.* v. *McGoldrick*, 279 N. Y. 184; *Matter of Compagnie Generale Transatlantique* v. *McGoldrick*, 279 N. Y. 192; *Matter of Felt & Tarrant Mfg. Co.* v. *McGoldrick*, 279 N. Y. 678.

The Character of the Seller's Liability Under the Sales Tax Law.

It is also clear that liability for payment of the tax imposed by the sales tax law is imposed upon both the seller and the purchaser. While the seller has both the right and the duty to collect the tax from the purchaser, he is nevertheless liable for the tax whether or not he is able to collect from the purchaser. In bankruptcy the liability of the seller is treated as a tax liability, as distinguished from a debt, and accordingly gives the City priority over other creditors. *Matter of Atlas Television Co., Inc.*, 273 N. Y. 51; *New York City* v. *Goldstein*, 299 U. S. 522, reversing *In re Lazaroff*, 84 F. (2d) 982. Thus, as between the City and the seller, the seller is a taxpayer, and respondent is so designated in petitioner's brief. The cases of *Matter of Merchants Refrigerating Co.* v. *Taylor*, 275 N. Y. 113 and *Matter of Kexbee, Inc.* v. *McGoldrick*, 278 N. Y. 293, referred to at page 7 of petitioner's brief as authority for the proposition that the tax is not imposed upon the seller, hold that the tax is imposed upon the buyer, but are not inconsistent with the decision in the *Atlas* and *Goldstein* cases treating the seller's liability as a tax liability.

The Taxes Assessed in this Case.

Petitioner has assessed and collected from respondent a tax of 2% upon the entire gross receipts from all sales made by respondent to purchasers located in New York City, including sales which were completed by delivery and transfer of title to the purchasers outside the City and State of New York. Petitioner has also assessed and collected from some of the same purchasers a "use" tax under Local Law No. 25 of 2% upon the amount of the purchase price of coal purchased from respondent within the period here involved, although the same receipts from the sale of the same coal to these very purchasers were made the basis of the assessment of the sales taxes here involved against respondent (R. 84, 85, 89).

Sales tax was assessed against and collected from one of the purchasers (Williamsburgh Power Plant Corporation) upon part of respondent's sales to that purchaser and in making his final determination petitioner deducted those taxes from the deficiency against respondent (R. 22). However, no such deduction or credit was made in respect of the "use" taxes assessed against and collected from respondent's purchasers on account of the tax under Local Law No. 25.

The Question Presented.

The decision of the New York Court of Appeals having been predicated "upon the sole ground that the City Sales Tax Law as here applied violates the Commerce Clause * * * of the Constitution of the United States" (R. 158), and petitioner having raised no other question in his petition for certiorari, we assume that the only question which will be considered

by this Court at this time is whether the City sales taxes assessed against and collected from respondent upon its sales (some of which sales were completed by delivery and transfer of title to the purchasers outside the City and State of New York) constitute a burden upon interstate commerce in violation of the commerce clause.

There is another question in the case relating to the sales which were consummated outside New York City. The City is without power to tax these sales because the Enabling Act expressly prohibits the City from imposing a tax upon "any transaction originating and/or consummated outside the territorial limits" of the City. *Matter of C. G. Gunther's Sons* v. *McGoldrick*, 279 N. Y. 148. Although this subsidiary question was raised and argued below, the Court of Appeals did not decide it, putting its decision solely upon the federal ground. In the event of an affirmance by this Court of the decision below it will be unnecessary to have that question decided. However, if this Court should render an adverse decision on the federal question, the question under the State Enabling Act would remain for decision by the Court of Appeals, and the case should be remanded to the Court of Appeals by this Court for further proceedings to determine the application of the State Enabling Act to those sales which were consummated outside the City and State of New York.

Summary of Argument.

I.

The tax levied against respondent upon the sales here involved is a direct and undue burden upon interstate commerce in violation of the commerce clause of the Federal Constitution.

A. The sales here involved are transactions in interstate commerce; interstate shipment was contemplated, required and made.

B. The event upon which the tax is laid is an inseparable part of an integrated interstate transaction.

C. The tax is invalid as an undue burden upon interstate commerce because, if upheld, the interstate sales would be subject to the danger of multiple and cumulative tax burdens to which local transactions are not exposed.

II.

The use tax cases are clearly distinguishable from the present case.

Argument.

I.

The tax levied against respondent upon the sales here involved is a direct and undue burden upon interstate commerce in violation of the commerce clause of the Federal Constitution.

This Court, in a long line of decisions involving the power of the states and their local subdivisions to impose taxes affecting interstate commerce, has construed the commerce clause as affording protection to interstate commerce against the imposition of direct and undue burdens by local taxation; and in the light of this construction it has clearly marked out both the field which the protection covers and the limits of the power of local taxing authorities seeking to enter that field. Recognizing on the one hand the need of local governments for revenue, and on the other hand the necessity of keeping the channels of interstate trade free of locally created barriers, this Court has laid down clearly defined principles giving full weight to the competing claims that while interstate commerce must bear its fair share of local tax burdens it must not be subjected to the danger of tax burdens that interfere with the free flow of interstate commerce. As this Court said in *Gwin, White & Prince, Inc.* v. *Henneford*, 305 U. S. 434, 441:

> "For more than a century, since *Brown* v. *Maryland*, 12 Wheat. 419, 445, it has been recognized that under the commerce clause, Congress not acting, some protection is afforded to interstate commerce against state taxation of the privi-

> lege of engaging in it. * * * For half a century, following the decision in *Philadelphia & Southern S. S. Co.* v. *Pennsylvania*, 122 U. S. 326, it has not been doubted that state taxation of local participation in interstate commerce, measured by the entire volume of the commerce, is likewise foreclosed. During that period Congress has not seen fit to exercise its constitutional power to alter or abolish the rules thus judicially established. Instead it has left them undisturbed, doubtless because it has appreciated the destructive consequences to the commerce of the nation if their protection were withdrawn. Meanwhile Congress has accommodated its legislation, as have the states, to these rules as an established feature of our constitutional system. There has been left to the states wide scope for taxation of those engaged in interstate commerce, extending to the instruments of that commerce, to net income derived from it, and to other forms of taxation not destructive of it. See *Western Live Stock* v. *Bureau of Revenue*, *supra*, 254, *et seq.*, and cases cited."

As we read the decisions of this Court, there are two separate and distinct aspects of the question at bar. First, it is necessary to determine whether the activity or event on which the tax is laid is within the field of interstate commerce; and, if so, the second question is whether the tax imposed is a legitimate exercise of state taxing power within that field.

The principles applicable to these two aspects of the question, in so far as they bear upon the case at bar, may, we believe, be stated in short compass. These principles are concerned with two factors, namely (1) the event or activity upon which the tax is laid, and (2) the measure of the tax.

A tax directed in terms or in its practical operation against interstate commerce as such, thereby discriminating in favor of local commerce, obviously interferes with the free flow of interstate commerce and is invalid. *Walling* v. *Michigan*, 116 U. S. 446; *Webber* v. *Virginia*, 103 U. S. 344; *Welton* v. *Missouri*, 91 U. S. 275; *Cook* v. *Pennsylvania*, 97 U. S. 566; *Brown* v. *Maryland*, 12 Wheat. 419.

A tax which is laid equally upon both local and interstate commerce may or may not be valid as applied to interstate transactions, depending upon how it is measured. If the measure of the tax be such that taxes levied upon the same interstate transaction by other states would result in a greater burden upon that transaction than is imposed upon similar local transactions, the tax is invalid because the exposure of the interstate transaction to those multiple tax burdens is discriminatory. In other words, a tax laid upon interstate sales, even though laid equally upon local sales, violates the commerce clause if it is measured by the entire gross receipts from such sales without a proper apportionment to the activities carried on within the state, for if the tax were upheld each state involved in the interstate movement could with equal right impose a tax similarly measured upon the same transactions. *Gwin, White & Prince, Inc.* v. *Henneford*, 305 U. S. 434; *Adams Mfg. Co.* v. *Storen*, 304 U. S. 307; *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250, 255-6; *Fisher's Blend Station, Inc.* v. *State Tax Commission*, 297 U. S. 650; *Philadelphia and Southern Steamship Co.* v. *Pennsylvania*, 122 U. S. 326; *Case of the State Freight Tax*, 15 Wall. 232.

On the other hand, a nondiscriminatory local tax laid upon the ownership or the use of property purchased in interstate commerce is valid even though

measured by the purchase price of the property, since the events or activities upon which the tax is imposed are purely local, occurring after interstate commerce has come to an end. *Southern Pacific Co.* v. *Gallagher*, 306 U. S. 167; *Felt & Tarrant Mfg. Co.* v. *Gallagher*, 306 U. S. 62; *Pacific Telephone & Telegraph Co.* v. *Gallagher*, 306 U. S. 182; *Henneford* v. *Silas Mason Co., Inc.*, 300 U. S. 577; *Monamotor Oil Co.* v. *Johnson*, 292 U. S. 86. Similarly, a local tax laid upon an event or activity, such as manufacturing or storage and withdrawal, completed within the taxing state before the interstate commerce begins, is valid though measured by the sale price of the property. *American Mfg. Co.* v. *St. Louis*, 250 U. S. 459; *Edelman* v. *Boeing Air Transport, Inc.*, 289 U. S. 249; *Eastern Air Transport, Inc.* v. *South Carolina Tax Commission*, 285 U. S. 147.

There is another principle which this Court has applied in defining an interstate sale for tax purposes. The mere fact that the goods sold have been shipped across state lines is not enough in and of itself to bring the transaction within the protection of the commerce clause. That protection is afforded only to a transaction in which the interstate shipment of the goods is contemplated and required. *Ware and Leland* v. *Mobile County*, 209 U. S. 405; *Banker Brothers Co.* v. *Pennsylvania*, 222 U. S. 210; *Wiloil Corp.* v. *Pennsylvania*, 294 U. S. 169; *Graybar Electric Co.* v. *Curry*, 308 U. S. ——, 84 L. Ed. 97, affirming —— Ala. ——, 189 So. 186.

This qualifying principle is no doubt a salutary one, for it tends to limit the scope of the protection of the commerce clause to transactions which are necessarily interstate transactions and prevents the use by taxpayers of the protective cloak of the commerce

clause as a means of avoiding taxes which they otherwise would have to pay.

This Court has been at great pains to make clear the principles applicable to taxation affecting interstate commerce, particularly for the guidance of local authorities in the enactment and enforcement of tax legislation, so that these important functions may be carried on in accordance with the Constitution. These principles have been studiously observed by a great many states in framing their tax legislation and in enforcing their tax laws.† Indeed the City of New York itself, when it came to enact its own legislation on this subject, followed the lead of other states and enacted both the sales tax and a compensatory "use" tax (see pp. 10-12, *supra*).

The state courts in passing upon the validity of sales and use taxes have also been guided by these principles. The sales tax here in question was held invalid as applied to interstate sales by the New York Court of Appeals, and the City's application to this Court for a review on certiorari was denied in 1938. *Matter of National Cash Register Co.* v. *Taylor*, 276 N. Y. 208; cert. denied 303 U. S. 656; *Matter of West Publishing Co.* v. *Taylor*, 276 N. Y. 535; cert. denied 303 U. S. 656. The present case and its companion

† In addition to New York City, thirteen states have retail sales taxes and compensating or use taxes: Alabama, Arkansas, California, Colorado, Iowa, Kansas, Michigan, North Dakota (use tax on motor vehicles only), Ohio, Oklahoma, Utah, Washington and Wyoming. A few other states have retail sales taxes only, and several other states have license taxes for the privilege of carrying on certain types of business, measured variously by gross income, gross receipts or gross value of sales or of purchases. See table compiled by Neil H. Jacoby as of July 1, 1937, in Tax Systems of the World (7 Ed. 1938, pp. 153-6) by The Tax Research Foundation, and 1939 supplement thereto.

cases were decided by the Court of Appeals on the authority of those decisions. The highest court of the State of Michigan has followed the same principles. *Montgomery Ward & Co., Inc.* v. *Fry*, 277 Mich. 260, 269 N. W. 166. Cases like *Graybar Electric Co.* v. *Curry*, 308 U. S.——, 84 L. Ed. 97, affirming ——Ala. ——, 189 So. 186, in which a sales tax was upheld, stand upon the same footing as *Wiloil Corp.* v. *Pennsylvania*, 294 U. S. 169 and *Banker Brothers Co.* v. *Pennsylvania*, 222 U. S. 210. These cases held that the transactions in question were not protected by the commerce clause, because the sales taxed were local sales by dealers, and interstate shipment of the goods was not contemplated and required. These

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As regards administration of these laws by local tax authorities Mr. Jacoby, then Supervisor of Research, Department of Finance, State of Illinois, said in *Conflicting Interpretations of Retail Sales Tax Laws*, 2 U. of Chicago L. R. 78, 96-7 (1934):

> "Only a few comments will be made herein in reference to regulations on interstate commerce, as conflicting interpretations have not been numerous. State sales tax authorities have generally looked to the physical movement of merchandise in reaching a determination as to the taxability of particular transactions, and correctly so. Place where contract was entered into, or purchase price paid, or where the vendor or purchaser reside or do business have been regarded as incidental factors. Regulations on this subject may be conveniently divided into two divisions, namely: (1) regulations respecting when interstate commerce ends, relating to movements of goods *into* a taxing state and (2) regulations respecting when interstate commerce begins, relating to movements of goods *out* of a taxing state. Where both state of origin and state of destination impose sales taxes, it will be readily understood that sales in interstate commerce between them involve one of these classes of regulations for one state and the reciprocal class for the other.
>
> The regulations of the states are in unanimous agreement that a sale which involves shipment or delivery of the goods from a vendor's stock to a purchaser in a second state is a transaction in interstate commerce, and that the state of origin cannot impose a tax with respect to such a sale. [Footnote omitted.] Likewise, there is general agreement that with respect to this same transaction, the state of destination cannot impose its tax. [Footnote omitted.] * * *."

cases are discussed at greater length at pages 31-5, *infra*.

The present case involves a tax upon sales. Under the decisions of this Court, the determination as to whether or not these sales are interstate sales and within the protection of the commerce clause depends upon whether or not shipment of the goods by the producing seller directly to the buyer from the point of origin outside the buyer's state was contemplated and required. If these sales are interstate sales within this rule, each such sale is an integrated whole and may not be broken down into a succession of local events in an effort to divorce each component event (here the transfer of title and possession, or the making of the contract of sale) from the interstate transaction and to treat it as something purely local and so outside the scope of the commerce clause.

The measure of the tax at bar is the entire gross receipts from the sales, without apportionment to activities or events occurring within the State or City of New York. If, as we maintain, these sales (including as their integral parts the negotiation and execution of the contracts, the transportation of the goods and the transfer of title) are interstate sales and fully within the protection of the commerce clause, then the final question is whether the measure of the tax is such that without the protection of the commerce clause the transactions would be subject to the risk of multiple tax burdens, the aggregate of which would work a discrimination against such transactions, and might even destroy them entirely. As this Court said in *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250, 255:

> "* * * local taxes, measured by gross receipts from interstate commerce, have often been pronounced unconstitutional. The vice characteristic

of those which have been held invalid is that they have placed on the commerce burdens of such a nature as to be capable, in point of substance, of being imposed * * * with equal right by every state which the commerce touches, merely because interstate commerce is being done, so that without the protection of the commerce clause it would bear cumulative burdens not imposed on local commerce. * * * The multiplication of state taxes measured by the gross receipts from the interstate transactions would spell the destruction of interstate commerce and renew the barriers to interstate trade which it was the object of the commerce clause to remove."

A.

THE SALES HERE INVOLVED ARE TRANSACTIONS IN INTERSTATE COMMERCE; INTERSTATE SHIPMENT WAS CONTEMPLATED, REQUIRED AND MADE.

This is a natural case of interstate commerce, for the transactions here involved constitute a steady stream of bituminous coal flowing daily in large quantities from the natural source of the coal at the seller's mines in Pennsylvania, through New Jersey to the ships and plants of the buyers at New York tidewater. The record shows beyond any shadow of doubt that the interstate character of these transactions, carried on in the same manner without variation for over forty years, was required by the practical necessities of the business, from the standpoint of both the buyer and the seller, and was as far from a device for the avoidance of taxes as anything could be.

The subject matter of each contract was a specified brand of coal (either Berwind's Eureka or Berwind's C Prime) to be produced by respondent from its

mines in Pennsylvania, the only source of such coal (R. 28-9, 46-7; Appendix A, pp. 59 *et seq., infra*). The parties contracted for these particular brands of coal, to be shipped from their source by the producer. All the coal was delivered by shipment direct from the mines and all deliveries made in New York City were made by shipment on board cars over the Pennsylvania Railroad to Harsimus Pier, Jersey City, and from there by barge to the purchasers' plants or steamships in New York City (R. 30-2, 63-5).

The coal was appropriated to the contracts outside New York State because it was mined upon specific orders only (R. 62, 63); it was specifically identified by waybills when loaded on board cars at the mines (R. 64); and when it was transferred from the cars to the barges at Jersey City each barge was consigned and delivered to a particular customer pursuant to a particular order, the bill of lading designating the customer as consignee (R. 64-5; Exhibit 41, R. 145). All such deliveries were complete when the barges came alongside the plants or steamships (R. 65). All such deliveries necessarily involved continuous transportation of the coal across state lines from the mines to the point of destination, and the coal did not come to rest in New York until after delivery to the purchaser was made, that is, when the barge came alongside the purchaser's plant or steamship.

It plainly appears from the record that delivery of the coal by shipment from the mines was contemplated by all the purchasers (R. 74, 88, 92-3, 97-8). The facts with respect to the course of dealing between respondent and its customers leave no room for doubt on this point. The character of respondent's business as a coal producer, the fact that the source of coal

sold was localized in Pennsylvania, the needs of the purchasers for daily deliveries of freshly mined coal in large quantities, the fact that respondent has never maintained any storage in New York State, the futility and impracticability of maintaining any such storage in meeting the extensive needs of its purchasers, the special delivery facilities maintained by respondent for the past forty years for the specific purpose of making deliveries directly from the mines, and the consistent practice of respondent over the past forty years of making deliveries from the mines—all these factors conclusively establish that delivery of the coal by shipment from the mines was not only the invariable course of dealing between the parties, but was the only course that could be followed for all practical purposes (R. 27-32, 68-72, 90-1).

The facts with respect to source and delivery of the coal were well known to the purchasers when the contracts were made. It was known that the coal which was the subject matter of each contract (either Berwind's Eureka or Berwind's C Prime) was obtainable only from respondent's mines in Pennsylvania (R. 46-7, 78). Indeed, most of the contracts expressly stipulated the source of the coal as the mines of respondent in Pennsylvania, and some went so far as to specify particular mines by name or number (Appendix A, pp. 59 *et seq.*, *infra*). The purchasers were informed that respondent did not maintain storage in New York, that it had delivery facilities for delivery of the coal directly from the mines, and that its practice was to make delivery from the mines through the medium of such facilities (R. 31, 47). This practice was of importance to the purchasers, particularly the public utility companies which required daily deliveries of freshly

mined coal in large quantities. The Purchasing Agent for the New York Edison Company, when asked whether respondent's delivery facilities and delivery practice had any bearing on his negotiation of contracts for the purchase of coal from respondent, testified, "That is the reason we continue to do business with them" (R. 77). Shipment from the mines was not only contemplated but was required. The contracts also fully confirm this fact (Appendix A, pp. 59 *et seq.*, *infra*).

The foregoing facts sufficiently distinguish the present case from cases like *Ware and Leland* v. *Mobile County*, 209 U. S. 405; *Banker Brothers Co.* v. *Pennsylvania*, 222 U. S. 210; *Wiloil Corp.* v. *Pennsylvania*, 294 U. S. 169, and *Graybar Electric Co.* v. *Curry*, 189 So. 186, affirmed November 6, 1939 on the authority of *Banker Brothers Co.* v. *Pennsylvania*, *supra*, and *Wiloil Corp.* v. *Pennsylvania*, *supra*. Petitioner apparently concedes that these cases are distinguishable, for he does not argue that they are controlling.

In the *Ware and Leland* case, *supra*, this Court upheld the application to a local brokerage firm in Alabama of an annual license tax on the business of buying and selling futures for speculation or on commission. As to those future contracts which were merely speculative and were not followed by actual delivery, the court held that the contracts were not the subject of interstate commerce. As to those contracts which actually resulted in delivery, the seller was at liberty to acquire the goods where he pleased, that is, in the market where the delivery was required or elsewhere. For these reasons the court held that the commerce clause did not apply, saying (p. 413):

> "In neither class of contracts, for sale or purchase, was there necessarily any movement of

commodities in interstate traffic because of the contracts made by the brokers. * * * The delivery, when one was made, was not because of any contract obliging an interstate shipment, and the fact that the purchaser might thereafter transmit the subject-matter of purchase by means of interstate carriage did not make the contracts as made and executed the subjects of interstate commerce."

In distinguishing cases like *Robbins* v. *Shelby County Taxing District*, 120 U. S. 489; *Rearick* v. *Pennsylvania*, 203 U. S. 507, and *Caldwell* v. *North Carolina*, 187 U. S. 622, the Court said (p. 412):

"In these cases goods in a foreign State are sold upon orders for the purpose of bringing them to the State which undertakes to tax them, and the transactions are held to be interstate commerce, because the subject-matter of the dealing is goods to be shipped in interstate commerce; to be carried between States and delivered from vendor to purchaser by means of interstate carriage."

In *Banker Brothers Co.* v. *Pennsylvania*, 222 U. S. 210, the tax involved was a tax imposed by Pennsylvania upon retail sales. Banker Brothers were retail automobile dealers in Pittsburgh. The New York manufacturer agreed to build for and sell automobiles to Banker Brothers at a certain percentage under the list price, deliveries to be f.o.b. Buffalo, New York. Banker Brothers made agreements to sell to its customers in Pennsylvania at the list price quoted f.o.b. Buffalo, New York. Thus there were two transactions of sale, one between the manufacturer and Banker Brothers and the other between Banker Brothers and the local purchaser. The automobiles were shipped by the manufacturer directly to Banker Brothers, who made payment to the manufacturer;

and Banker Brothers, receiving the automobiles in Pittsburgh, delivered them in turn to its customers in Pennsylvania. Banker Brothers claimed that the sales to its customers were interstate sales within the protection of the commerce clause. The Court held that the sales were taxable, pointing out that the transactions between Banker Brothers and its customers were wholly intrastate and that the purchaser in Pittsburgh (p. 214) "was not concerned with the question as to how the machine was acquired by his vendor, or whether that company [Banker Brothers] bought it from another dealer in the same city or from the manufacturer in New York."

In *Wiloil Corp.* v. *Pennsylvania*, 294 U. S. 169, the tax involved was imposed "upon all liquid fuels used or sold and delivered by distributors within" Pennsylvania. The Wiloil Corporation was a local corporation engaged in selling liquid fuels at wholesale to consumers in Pennsylvania. It obtained the fuels covered by its contracts from another company located in Wilmington, Delaware. The fuels were sold at a specified price "f.o.b. Wilmington, Del." and were shipped from Wilmington directly to the buyers in Pennsylvania. As in the *Banker Brothers* case, there were two transactions of sale, namely, one between the company in Wilmington and Wiloil Corporation, and the other between Wiloil Corporation and its customers; and the tax was laid upon the local sale by Wiloil Corporation to its customers. In holding that these sales were not interstate sales, the Court said (pp. 173-5):

> "Appellant was not required by the contracts to obtain the fuels at Wilmington but was free to effect performance by shipping from any place within or without Pennsylvania. It is the practice in appellant's business to sell f.o.b. at a specified place in order to fix the price, and such

billing may be merely price-fixing and not an indication of the source or place of shipment.

* * * * * * *

"These contracts did not require or necessarily involve transportation across the state boundary.

* * * * * * *

"* * *. As interstate transportation was not required or contemplated, it may be deemed as merely incidental. Cf. *Moore* v. *N. Y. Cotton Exchange*, 270 U. S. 593, 604. *Ware & Leland* v. *Mobile County*, 209 U. S. 405, 412-413. The act lays no burden on interstate commerce as such, and if any can be said to result from the imposition, it is indirect and precisely as that which would have resulted if deliveries had been made exclusively by intrastate transportation from Pennsylvania sources."

In *Graybar Electric Co.* v. *Curry*, 189 So. 186, affirmed 308 U. S. —, 84 L. Ed. 97, the tax involved was imposed upon the business of selling tangible personal property at retail and was measured by 2% of the gross receipts. The Graybar Company was a dealer or jobber in electrical supplies with a branch office in Birmingham, Alabama. It was engaged in purchasing electrical supplies from manufacturers and selling them to consumers in Alabama. It had one warehouse in Birmingham and another in Atlanta, Georgia, where it kept certain articles of its stock in trade. There were two methods of filling orders of its customers in Alabama, namely, (1) by shipment from its warehouse in Atlanta and (2) by having the manufacturer (General Electric Company) ship from its plant in Ohio directly to the customer. In the latter class of cases it purchased the supplies from the manufacturer under one contract and sold them to its customers under a separate contract with the

customer. Some of these latter contracts contained the provision that "the material covered by this contract shall be manufactured at the plant of the General Electric Company located in the State of Ohio and shipped in interstate movement from said plant to destination". Others of these contracts did not contain any provision with regard to the source of the goods. The court held that none of the sales by the Graybar Company were interstate sales entitled to the protection of the commerce clause, saying (189 So. 186, 190):

> "The means by which, and the place from which, the complainant obtained the goods to fulfill its contract were but incidents in the transaction, and cannot serve to change the status of the transactions. The consumers had no dealings with the nonresident manufacturers. Their contracts were with the complainant in Alabama for the sale and delivery of the goods to them in Alabama."

With respect to the contracts which specified "interstate movement" the court said (p. 190):

> "It was no benefit to the purchasers that the goods were to be shipped 'in interstate movement' for the reason that the price of the goods would be the same, whether shipped 'in interstate movement' or not. Evidently this provision as to 'interstate movement' was to preclude, if possible, the imposition of a sales tax on the goods in Alabama. The transactions were Alabama sales within the provision of the Alabama Sales Tax Law. The form or language of the customers' orders cannot affect the case."

On the point of the form of the orders, the court referred to *Superior Oil Co. v. State of Mississippi*, 280 U. S. 390, in which a similar attempt artificially to create an interstate transaction had been made. In

that case Mr. Justice Holmes indicated the distinction between an artificial and a real interstate transaction when he said (p. 396):

> "It is a matter of proximity and degree as to which minds will differ, but it seems to us that the connection of the seller with the steps taken by the buyer after the sale was too remote to save the seller from the tax. Dramatic circumstances, such as a great universal stream of grain from the State of purchase to a market elsewhere, may affect the legal conclusion by showing the manifest certainty of the destination and exhibiting grounds of policy that are absent here."

The distinction between all these cases and the case at bar is plain. The present case is one in which the purchaser requires a special brand of coal, in large quantities, the only source of which is the producer's own mines in Pennsylvania. The producer sells directly to the consumers in circumstances which, as a matter of practical necessity both from the standpoint of the producing seller and the purchaser, require the shipment of the coal from the seller's mines directly to the purchaser. Here there is only one transaction; namely, the interstate sale; this is not a case of a dealer who buys outside the state and sells locally. Here there is nothing artificial in the interstate character of the transaction; the interstate character of the transaction is the essence of it. This is the very case which Mr. Justice Holmes in the *Superior Oil Co.* case had in mind, for here interstate movement of the coal is a "manifest certainty" and it is necessary as a matter of policy that the movement of this constant stream of coal from Pennsylvania to New York be protected under the commerce clause against the imposition of discriminatory and destructive tax burdens.

B.

THE EVENT UPON WHICH THE TAX IS LAID IS AN INSEPARABLE PART OF AN INTEGRATED INTERSTATE TRANSACTION.

Local Law No. 20 as amended by No. 24 imposes a tax of 2%, "upon the amount of the receipts from every sale in the city of New York", defining the word "sale" as meaning "any transfer of title or possession or both * * * for a consideration, or any agreement therefor". Thus in respect of the sales in the present case, which were completed by delivery in New York City, there are two events upon which the tax, if valid, would be laid, namely, the making of the contract of sale and the transfer of title and possession. In respect of the sales which were completed by delivery outside New York, the only event occurring in New York City was the making of the contract.

It is obvious that shipment, transportation and delivery of the coal to the purchaser at destination are all part of the interstate transaction. Shipment and transportation across state lines are the essence of interstate commerce and the delivery and transfer of title to the purchaser at the terminus cannot be divorced from the transportation and treated as a purely local activity, for it is physically a part of the transportation of the goods. Here the deliveries were complete and title passed to the purchasers only when respondent's barges came alongside the purchasers' plants or steamships; unloading was done by the purchasers (R. 65, 76).

The case of *Puget Sound Stevedoring Co.* v. *State Tax Commission*, 302 U. S. 90, establishes that the delivery and transfer of title in the present case is well within the protection of the commerce clause.

The tax there involved was imposed for the privilege of engaging in business within the state measured by a specified percentage of gross receipts. The taxpayer was engaged in the business of loading and unloading vessels plying exclusively in interstate and foreign commerce. It was held that the loading and unloading of these vessels was an inseparable part of such commerce. The Court said (p. 94):

> "The business of loading and unloading being interstate or foreign commerce, the State of Washington is not at liberty to tax the privilege of doing it by exacting in return therefor a percentage of the gross receipts. Decisions to that effect are many and controlling."

Petitioner seeks to justify the tax in the present case upon the ground (p. 43) that the transfer of possession and title to the purchaser is "essentially a local event". But if, as this Court held in the *Puget Sound* case, the unloading is an integral part of interstate commerce and within the protection of the commerce clause, there can be no doubt that the delivery of title and possession, the event which precedes the unloading as a part of the interstate movement, is also interstate commerce within the protection of the commerce clause.

Since the negotiation and execution of the contract of sale are indispensable incidents of the interstate sale, these activities are necessarily within the field of protection afforded by the commerce clause. *Gwin, White & Prince, Inc.* v. *Henneford*, 305 U. S. 434, 437; *Real-Silk Hosiery Mills* v. *Portland*, 268 U. S. 325; *Davis* v. *Virginia*, 236 U. S. 697; *Rearick* v. *Pennsylvania*, 203 U. S. 507; *Brennan* v. *Titusville*, 153 U. S. 289; *Robbins* v. *Shelby County Taxing District*, 120 U. S. 489. See *Adams Mfg. Co.* v. *Storen*, 304 U. S. 307, 311.

In *Real Silk Hosiery Mills* v. *Portland*, *supra*, this Court said (p. 335), quoting with approval *Robbins* v. *Shelby County Taxing District*, *supra* (p. 497):

> "The negotiation of sales of goods which are in another State, for the purpose of introducing them into the State in which the negotiation is made, is interstate commerce."

And in *Gwin, White & Prince, Inc.* v. *Henneford*, *supra* (p. 437):

> "We need not stop to consider which, if any, of appellant's activities in carrying on its business are in themselves transportation of the fruit in interstate or foreign commerce. For the entire service for which the compensation is paid is in aid of the shipment and sale of merchandise in that commerce. Such services are within the protection of the commerce clause, *Robbins* v. *Shelby County Taxing District*, 120 U. S. 489; *Caldwell* v. *North Carolina*, 187 U. S. 622; *Real Silk Mills* v. *Portland*, 268 U. S. 325; and the only question is whether the taxation of appellant's gross receipts derived from them is such an interference with interstate commerce as to bring the tax within the constitutional prohibition."

C.

THE TAX IS INVALID AS AN UNDUE BURDEN UPON INTERSTATE COMMERCE BECAUSE, IF UPHELD, THE INTERSTATE SALES WOULD BE SUBJECT TO THE DANGER OF MULTIPLE AND CUMULATIVE TAX BURDENS TO WHICH LOCAL TRANSACTIONS ARE NOT EXPOSED.

The protection afforded by the commerce clause covers interstate commerce as such, and the commerce

so protected includes all the activities going to make up such commerce. In a case such as this, the commerce is the interstate sale as an integrated whole, namely, the negotiation and execution of the contract of sale, the shipment, transshipment and transportation of the goods and their delivery to the purchaser at destination.

There can be no doubt that the tax here laid upon the transfer of possession and title to the purchasers in completion of interstate sales is a direct burden upon interstate commerce, for it means that such commerce must bear the burden of two cents upon every dollar of receipts from the interstate sales. If this were the only burden to which the sales were exposed, there might be no ground for complaint, for local transactions are subject to the same burden. But here the various activities constituting the integrated interstate transaction occur in three different states, namely, Pennsylvania, New Jersey, and New York, and if the entire interstate transaction were not protected by the commerce clause Pennsylvania and New Jersey could also impose taxes upon the activities within their borders constituting necessary parts of the interstate transaction, and could also measure such taxes by the entire gross receipts. The effect of such multiple burdens would be discriminatory, if not indeed destructive, because local transactions are not exposed to such burdens. *Gwin, White & Prince, Inc.* v. *Henneford*, 305 U. S. 434; *Adams Mfg. Co.* v. *Storen*, 304 U. S. 307. See *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250.

The danger to which these sales would be exposed if they should be deprived of the protection of the commerce clause is readily discernible. If New York City were permitted to single out the transfer of possession or the making of the contract, occurring within its borders, and to treat it as a purely local event

divorced from interstate commerce, and to impose a tax upon it measured by the entire gross receipts from the sale, of which it is an integral part, then Pennsylvania and New Jersey could with equal right single out and treat as purely local events the phases of the interstate transaction which occur within their borders and impose taxes upon those phases of the transaction measured by the same receipts. For example, the act of shipment or delivery to the carrier, occurring in Pennsylvania as the beginning of the interstate transportation, would surely have the same status as a taxable event as would the act of delivery to the purchaser, which is the end of the interstate transportation and occurs in New York. Pennsylvania might impose a general tax upon all deliveries to carriers for shipment, including interstate as well as intrastate shipments. Such a tax, imposed at the rate of 2% upon the gross receipts from or the value of the property shipped, would, as applied to the transactions here involved, result in doubling the burden imposed upon these transactions. Nothing but the commerce clause stands in the way of the imposition of such a tax. (See *Case of the State Freight Tax*, 15 Wall., 232.)

But this is not all. The coal is carried by rail from the mines in Pennsylvania to a pier in New Jersey, where it is transshipped by water to destination. If these transactions were not protected by the commerce clause, New Jersey, by imposing a general tax upon all transshipments, whether interstate or intrastate, measured by the gross receipts from the transactions or the value of the goods transshipped, could impose a third burden upon these transactions. If the tax on delivery to the carrier imposed by Pennsylvania, when added to the tax on delivery to the purchaser imposed by New York, had not already broken the back of this interstate business, the third

tax imposed by New Jersey would certainly be the *coup de grace*, because competing fuels sold locally in New York would not be exposed to such burdens.

The danger of the imposition of these discriminatory burdens is an intensely real and practical one. It cannot be brushed aside by the mere statement that each of the taxes suggested is upon a different event and that each event is peculiarly local to the jurisdiction in which it occurs; nor is the danger any different whether the person who is required to pay the tax is the buyer or the seller. The doctrine that interstate transactions must be kept free from the danger of multiple and cumulative burdens imposed by different states would be meaningless if it were limited in its application to multiple taxes upon the same component event and the same person. The due process clause prohibits one state from imposing a tax upon an event which occurs in another state or upon a person resident in another state; the commerce clause is not necessary to protect the transactions in that respect. The commerce clause permits wide scope in the imposition of local taxes, but when there is a danger that local taxes may be imposed by more than one state upon different phases of an integrated interstate transaction then the fact that such taxes will become cumulative burdens upon the transaction and thus create trade barriers between the states or destroy the commerce entirely makes it absolutely necessary to bring the commerce clause into play.

Petitioner, in arguing that there can be no "multiple taxation" here, misconceives the rule which protects interstate transactions from exposure to multiple tax burdens. He says (p. 39) that "the moment at which interstate commerce begins or ends is important not for its own sake so much as because it forms a convenient test for determining whether or

not the tax is of such a nature that it can be imposed in every state which the commerce touches", and that "the ultimate question to be determined is not whether the commerce has commenced or ended, but whether the tax is one which can be imposed in more than one State." His conception of the rule, or as he calls it, the "doctrine of multiple taxation" (p. 40), is that protection is limited to a prohibition of multiple levies by different states upon the same local event and against the same person. But obviously this cannot be the meaning of the rule; as petitioner himself points out (p. 44), the due process clause forbids one state to tax an event occurring in another state and limits the classes of persons who may be taxed by a state to persons resident, doing business or having property within the state. These limitations are in themselves sufficient to eliminate the possibility of "multiple taxation" in the sense in which petitioner uses that term. But, as this Court has held in the *Adams Mfg. Co.* and *Gwin, White* cases, interstate transactions are not sufficiently protected by these limitations of the due process clause; they must have further protection under the commerce clause for the obvious reason that in the course of an interstate transaction moving through two or more states there will occur in each state an event or events within the power of the state to tax under the due process clause, and in each state there will be persons participating in the transaction whom that state has jurisdiction to tax. If the states should be permitted fully to exercise their taxing powers without restriction by the commerce clause, the interstate transactions would be exposed to multiple tax burdens. It is obvious that the sum of such burdens, if imposed, would be discriminatory.

Petitioner argues that the tax, if upheld, would not expose the transactions to discriminatory bur-

dens because the person liable for the tax is not the vendor but the purchaser. Whether the tax is payable by the buyer[1] or the seller[2] or the carrier[3] or the stevedore[4] is unimportant; at all events the economic burden upon the transaction is the same, since the amount of the tax will be reflected either in an increased cost of the goods to the buyer or a decreased profit to the seller. The triple tax burden, if permitted to be imposed upon the interstate sales here involved, would in effect be an insuperable trade barrier erected in direct contravention of the spirit and purpose of the commerce clause.

Petitioner further argues that a tax upon a purchaser-consumer is not a tax upon interstate commerce, because the purchaser for consumption is not engaged in interstate commerce. The business in which the purchaser is engaged is quite immaterial, as this is not a tax upon his business but upon an interstate transaction in which he participates. The question here is whether the tax, if upheld, would result in exposing the interstate transaction to multiple burdens. What the purchaser's activities are, apart from his participation in the interstate transaction, has no bearing upon that question, for those activities occur after the interstate sale is completed. If the nature of the purchaser's business were material we might point out that among the purchasers from the respondent are a number of steamship companies all of whom are engaged in interstate and foreign commerce and immediately use the coal purchased as fuel upon their ships. But

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[1] See *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250, 260-1.

[2] *Adams Mfg. Co.* v. *Storen*, 304 U. S. 307.

[3] *Case of the State Freight Tax*, 15 Wall. 232.

[4] *Puget Sound Stevedoring Co.* v. *State Tax Commission*, 302 U. S. 90.

we do not press this point because, as this Court said in *Gwin, White & Prince, Inc.* v. *Henneford*, 305 U. S. 434, 441:

> "For half a century following the decision in *Philadelphia & Southern S. S. Co.* v. *Pennsylvania*, 122 U. S. 326, it has not been doubted that state taxation of local participation in interstate commerce, measured by the entire volume of the commerce, is '* * * foreclosed.'"

And in *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250, 260-1, this Court, referring to *Fisher's Blend Station, Inc.* v. *State Tax Commission*, 297 U. S. 650, said:

> "There the exaction was a privilege tax laid upon the occupation of broadcasting, which the Court held was itself interstate communication, comparable to that carried on by the telegraph and the telephone, and was measured by the gross receipts derived from that commerce. If broadcasting could be taxed, so also could reception. *Station WBT, Inc.* v. *Poulnot*, 46 F. (2d) 671. In that event a cumulative tax burden would be imposed on interstate communication such as might ensue if gross receipts from interstate transportation could be taxed. This was the vice of the tax of a percentage of the gross receipts from goods sold by a wholesaler in interstate commerce, held invalid in *Crew Levick Co.* v. *Pennsylvania*, *supra*. In form and in substance the tax was thought not to be one for the privilege of doing a local business separable from interstate commerce."

In any event, the tax at bar has been assessed against and collected from respondent as vendor, and respondent is unquestionably engaged in interstate commerce. Although petitioner refers to respondent throughout his brief as "the taxpayer" he says in

the same breath (p. 43) that "The taxpayer is not the seller but the local purchaser." Whatever words are used by petitioner to describe the liability asserted against respondent here, it is quite clear under the decisions of the New York courts that the liability so asserted is a real liability for taxes; and if respondent does not prevail in this litigation, it will be out-of-pocket to the extent that it is not able to collect from the purchasers. *Matter of Atlas Television Co.*, 273 N. Y. 51; *New York City* v. *Goldstein*, 299 U. S. 522, reversing *In re Lazaroff*, 84 F. (2d) 982, on the authority of the *Atlas* case.

Petitioner argues that the tax is not a burden upon interstate commerce because it applies equally to all sales in the state and (p. 17) "The purchaser pays the same tax upon goods produced by his local neighbor as he does upon goods brought from across the continent." Of course the tax is not a burden in this sense. But this wholly ignores the rule against subjecting interstate sales to the danger of multiple burdens. If, as petitioner suggests, the goods were brought from California to New York, twelve or more states through which the goods passed could exact multiple tribute from the transactions unless they were protected by the commerce clause. This Court has always regarded the necessity of protecting interstate commerce from that danger as paramount and has repeatedly held that where that danger exists the tax is invalid under the commerce clause even though it is general and nondiscriminatory in terms. In *Adams Mfg. Co.* v. *Storen*, 304 U. S. 307, 312, this Court said:

> "The opinion of the State Supreme Court stresses the generality and nondiscriminatory character of the exaction but it is settled that this will not save the tax if it directly burdens interstate commerce."

Other cases to the same effect are *Gwin, White & Prince, Inc.* v. *Henneford*, 305 U. S. 434; *Crew Levick Co.* v. *Pennsylvania*, 245 U. S. 292; *Case of the State Freight Tax*, 15 Wall. 232, 276-7; *Robbins* v. *Shelby County Taxing District*, 120 U. S. 489, 497.

Petitioner, on page 16, refers to *Graves* v. *New York ex rel. O'Keefe*, 306 U. S. 466 (the recent decision of this Court upholding a state income tax upon the salary of an employee of a federal instrumentality), and seeks to draw a parallel between the question of burden in that case and the question of burden here. Therein lies the fundamental fallacy of petitioner's whole argument in this case. In the immunity cases like the *Graves* case there is only one taxing government involved, and the question is whether the tax imposed by that government is an undue burden upon or interference with the other government whose employee is subject to the tax. In that case the employee was subjected to no greater or different tax than persons employed by private enterprise, and the burden upon the employing government, to the extent that it existed, was (p. 487) "but the normal incident of the organization within the same territory of two governments, each possessing the taxing power."

The question of burden under the commerce clause is a wholly different question. Interstate commerce involves forty-eight states—forty-eight taxing governments, each with many taxing subdivisions. An interstate transaction necessarily involves at least two states and may involve three states, as here, or possibly as many as twelve or fifteen states. In view of this situation the Court, in framing a rule for the protection of interstate commerce against discrimination and the erection of trade barriers, has never limited itself to the simple question as to whether the tax imposed by any *one* state is imposed alike upon interstate and local commerce. A rule drawn

upon such a narrow ground would certainly result in the imposition of discriminatory multiple burdens upon interstate transactions, for each state which the commerce touches could satisfy the requirement of such a rule by imposing taxes upon interstate and local transactions alike, with the result that the local transactions would be subject to a single burden while the interstate transactions would be subject to from two to fifteen identical burdens depending upon how many states exacted what each would call a "non-discriminatory" tax.

It might be suggested that the power to impose "non-discriminatory" taxes upon the activities constituting an integrated interstate sale be limited to one state—the state of destination, for if so, such sales would be on a parity with local sales and there would be no multiplicity of burden. However, such a rule would violate the fundamental right of each state in the Union to receive equal treatment under the Constitution. To allow the state of destination to impose a tax upon activities occurring within its borders which are integral parts of an interstate sale, while at the same time denying an equal right to the states of origin, transshipment and transportation to impose taxes upon the activities occurring within their borders when such activities are part of an integrated interstate sale, would be contrary to this fundamental constitutional requirement of equality, for it would discriminate in favor of one state against the others.

Such a rule would also be in direct conflict with the decisions of this Court in *Adams Mfg. Co.* v. *Storen*, 304 U. S. 307, and *Gwin, White & Prince, Inc.* v. *Henneford*, 305 U. S. 434. In those cases the taxes imposed by the state of origin were held invalid, not because they were imposed by the state

of origin, but because they were measured by the entire gross receipts from the commerce without apportionment to the activities carried on within the taxing state. The principle applied in those cases is that a tax upon interstate transactions may not be imposed by any state if it is measured by entire gross receipts, but may be imposed only if the measure of the tax is a fair proportion of the gross receipts allocated to the activities carried on within the state. This, we believe, is the only principle which will preserve to each state its equal rights and at the same time avoid the imposition upon interstate commerce of discriminatory burdens.

The tax at bar, being measured by entire gross receipts, has precisely the same vice as the taxes involved in the *Adams* and *Gwin, White* cases, and the reasons which resulted in the invalidation of the taxes in those cases are equally applicable here.

In the *Adams* case, this Court said (pp. 311-2):

> "The vice of the statute as applied to receipts from interstate sales is that the tax includes in its measure, without apportionment, receipts derived from activities in interstate commerce; and that the exaction is of such a character that if lawful it may in substance be laid to the fullest extent by States in which the goods are sold as well as those in which they are manufactured. Interstate commerce would thus be subjected to the risk of a double tax burden to which intrastate commerce is not exposed, and which the commerce clause forbids. We have repeatedly held that such a tax is a regulation of, and a burden upon, interstate commerce prohibited by Article I, §8 of the Constitution. The opinion of the State Supreme Court stresses the generality and nondiscriminatory character of the

exaction, but it is settled that this will not save the tax if it directly burdens interstate commerce."

And in the *Gwin, White* case this Court said (pp. 439-40):

> "Here the tax, measured by the entire volume of the interstate commerce in which appellant participates, is not apportioned to its activities within the state. If Washington is free to exact such a tax, other states to which the commerce extends may, with equal right, lay a tax similarly measured for the privilege of conducting within their respective territorial limits the activities there which contribute to the service. The present tax, though nominally local, thus in its practical operation discriminates against interstate commerce, since it imposes upon it, merely because interstate commerce is being done, the risk of a multiple burden to which local commerce is not exposed. * * * Such a multiplication of state taxes, each measured by the volume of the commerce, would re-establish the barriers to interstate trade which it was the object of the commerce clause to remove. Unlawfulness of the burden depends upon its nature, measured in terms of its capacity to obstruct interstate commerce, and not on the contingency that some other state may first have subjected the commerce to a like burden."

The unsoundness of petitioner's approach to the question of burden is well illustrated by the argument made under Point IV D of his brief at pages 47 *et seq.* The argument there made suggests another form which the discriminatory multiple burdens upon these sales might take.

Pennsylvania is the home state of respondent. It has its main office in Philadelphia and carries on ex-

tensive business in Pennsylvania. The coal is mined and shipped from Pennsylvania; the orders are received in Pennsylvania by transmission from the New York office and the receipts from the sales are transmitted to Philadelphia, where they are deposited. Pennsylvania has the unquestioned power to impose upon respondent an excise tax for the privilege of doing business, including the business of selling coal to New York City purchasers. If such a tax were measured by the entire gross receipts from such sales and were at the same rate as the New York City sales tax, the burden on such sales would be twice the amount of the tax to which local sales in New York City would be subject. Even if the Pennsylvania gross receipts tax were apportioned in accordance with the requirements laid down by this Court in the *Gwin, White* case, the burden would still be greater than that imposed upon local sales in New York City, for the New York City sales tax is upon the entire gross receipts without apportionment.

Petitioner seeks to meet this by pointing out (p. 49) that New York City now imposes a gross receipts tax for the privilege of doing business, the measure of which as applied to interstate vendors is a portion of the gross receipts allocated to New York, and as applied to local vendors is the entire gross receipts. The rate of the tax is 1/10th of 1%†. He concedes (and properly so) that under the rule of the *Adams*

† This New York City tax has been in effect since 1934, having been re-enacted each year. Originally there was no provision for apportionment of receipts from interstate commerce, and such receipts were excluded from the measure of the tax under the Comptroller's regulations and in the return forms. Since the re-enactment of 1938, which occurred after the decision of this Court in the *Western Live Stock* case, the law has required apportionment of such receipts. See Local Laws Nos. 9 of 1934, 17 of 1934 (printed in the official compilation as No. 18), 32 of 1935, 29 of 1936, 22 of 1937, 20 of 1938 and 103 of 1939; New York City Business Tax Regulations, Art. 238.

and *Gwin, White* cases Pennsylvania could not impose such a tax upon entire gross receipts, but would be required to impose it on a portion of the receipts based upon activities within the state. Assuming a proper apportionment by both New York and Pennsylvania, he says that "adding the two proportions, the seller will pay one tax on the full amount of the receipts from the sale, apportioned between the two States", but then he adds, "Quite apart from that, as a totally separate tax, the purchaser will pay a full tax on the purchase of the goods", thus putting the Pennsylvania seller in exactly the same position as the local seller, who pays the New York gross receipts tax on the *full* amount of his local sales, while the purchaser of those goods similarly pays a tax on the same transaction."

The argument contains the seed not only of its own destruction but of the destruction of petitioner's whole position. Petitioner assumes an apportioned gross receipts tax imposed upon the seller by Pennsylvania, in accordance with the rule of the *Adams* and *Gwin, White* cases and argues that the New York City apportioned gross receipts tax, enacted in accordance with the rule of the *Gwin, White* case, brings about equality between Pennsylvania and New York vendors so far as that type of tax is concerned, thus establishing the soundness of the *Gwin, White* principle. He overlooks the obvious fact that if, contrary to the *Gwin, White* principle, both Pennsylvania and New York could and did impose their taxes upon the same sales without apportionment, the desired equality would not exist; Pennsylvania vendors would pay twice as much tax as New York vendors upon their sales to New Yorkers. He then goes on to point out that the New York City sales tax is imposed equally upon sales by Pennsylvania and New York vendors measured by the full amount of the receipts. Again he

overlooks the fact that this is not the equality required by the *Gwin, White* case, for it would be destroyed by the enactment in Pennsylvania or New Jersey or both of a tax or taxes upon these transactions measured as the New York tax is measured, namely, by the entire gross receipts. In other words, as we have said, the vice of the taxes held invalid in the *Adams* and *Gwin, White* cases, is precisely the same as the vice which renders the tax at bar invalid.

II.

The use tax cases are clearly distinguishable from the present case.

As we have pointed out, the tax at bar is in terms, as well as by judicial construction of the New York courts, a tax laid upon the transaction of sale; it is not a tax upon use or ownership by the purchaser after the purchaser has acquired the property. A separate and distinct tax upon such use or ownership is imposed by the City under Local Law No. 25 (printed as Appendix B, pp. 65 *et seq., infra*). We have also shown that the practical effect of upholding the validity of the sales tax as applied to the interstate sales here involved would be to subject them to the danger of discriminatory and destructive multiple tax burdens to which local sales are not exposed.

Petitioner argues that the tax at bar is identical with the California use tax sustained by this Court in *Felt & Tarrant Mfg. Co.* v. *Gallagher*, 306 U. S. 62; *Southern Pacific Co.* v. *Gallagher*, 306 U. S. 167; and *Pacific Telephone & Telegraph Co.* v. *Gallagher*, 306 U. S. 182, and that consequently the tax here involved should be sustained. It is true that there are some superficial similarities between the California use tax

and the New York City sales tax, but these taxes fundamentally are different in character and purpose.

The use tax is imposed upon "storage, use or other consumption" in California "of tangible personal property purchased from a retailer", "use" being defined as "including the exercise of any right or power over tangible personal property incident to the ownership of that property" except sale of the property in the regular course of business. This language obviously covers the use of property after it has been acquired by the purchaser; it does not cover and was not intended to cover the transaction, or any part of the transaction in which the purchaser acquired the property from the retailer. The New York City property or use tax (Local Law No. 25) is identical with the California use tax in this respect. But the New York City sales tax is imposed upon the transaction of sale, "sale" being defined as "the transfer of title or possession or both * * * for a consideration, or any agreement therefor". Here the tax is clearly imposed upon the transaction by which the purchaser acquires the property; it is not imposed upon the use of the property by the purchaser after the transaction of acquisition is complete.

Petitioner recognizes this difference but says it is merely one of words rather than of substance. The difference is one of real substance, however, because it is a difference in the choice of the thing taxed. As this Court pointed out in *Southern Pacific Co.* v. *Gallagher*, 306 U. S. 167, 177:

> "State taxes upon national commerce or its incidents do not depend for their validity upon a choice of words but *upon the choice of the thing taxed.* * * * The prohibited burden upon commerce between the states is created by state interference with that commerce. * * *. A discrimina-

tion against it, or a tax on its operations as such, is an interference. A tax upon property or upon a taxable event in the state, apart from operation, does not interfere. This is a practical adjustment of the right of the state to revenue from the instrumentalities of commerce and the obligation of the state to leave the regulation of interstate and foreign commerce to the Congress." (Italics ours.)

In arguing that the two taxes are identical petitioner does not say that the New York City sales tax is a use tax; he says that the California use tax is a sales tax. At page 21 of his brief, in referring to the tax involved in *Southern Pacific Co. v. Gallagher*, he says that "the tax was imposed upon the transfer of the property to the railroad company in California." This statement in itself is enough to show the extremely strained character of his argument. How a tax imposed upon "the exercise of any right or power incident to ownership" can be called a tax imposed upon the transaction by which the taxpayer *acquires* ownership is completely beyond our understanding.

California, like New York City, has both a sales tax and a use tax.[1] As in the case of the New York City use tax, the California use tax was enacted as a compensatory tax complementary to its sales tax, and designed to equalize taxation in cases where the sales tax could not reach the transactions, such as sales occurring or originating outside the state or interstate sales protected under the commerce clause.

[1] The California sales tax was enacted July 31, 1933 as Chapter 1020 of the Statutes of California, 1933; the California use tax was enacted June 25, 1935 as Chapter 361 of the Statutes of California, 1935 and amended by Chapters 401, 671 and 683 of the Statutes of California, 1937.

The New York City use tax is designed to fulfill the same function in New York City as does the California use tax in California. Indeed, the two taxes are substantially the same in incidence and effect. The New York City sales tax can be no more identified with the California use tax than it can with the New York City use tax. The fact that under the California use tax the so-called "retailer" is required to collect the tax from the person "storing, using or otherwise consuming" the property purchased from the retailer,[1] which amount constitutes a "debt"[2] of the retailer to California, does not vary the character or incidence of the use tax, any more than the fact that the seller is made liable for the New York City sales tax,[3] with a right of action over against the buyer, varies the character or incidence of the sales tax.

The observance of the fundamental distinction between the character and designed purposes of the two taxes as they exist side by side in New York City, as well as in California, is vital to the preservation of interstate commerce, in view of the principles which this Court has laid down in construing the commerce clause. This Court has drawn a clear line between those taxes which can be measured by entire gross receipts or their equivalent and those which cannot. Local activities which are not directly connected with interstate selling, but either precede it or follow it, can be subjected to a tax measured by entire gross receipts. *American Mfg. Co.* v. *St. Louis*, 250 U. S. 459 (manufacturing in the state of origin); *Southern Pacific Co.* v. *Gallagher*, 306

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[1] Sections 3 and 6 of the California use tax.

[2] Section 6 of the California use tax.

[3] *Matter of Atlas Television Co.*, 278 N. Y. 51; *New York City* v. *Goldstein*, 299 U. S. 522, reversing *In re Lazaroff*, 84 F. (2d) 982.

U. S. 167; *Henneford* v. *Silas Mason Co., Inc.*, 300 U. S. 577 (use in the state of destination). But interstate selling, including all parts of the transaction of sale, from the negotiation of the contract to and including its consummation by delivery to the buyer, cannot be subjected to a tax measured by gross receipts without proper apportionment, because if such a tax were valid the interstate sales would be subject to the danger of multiple tax burdens, discriminatory and destructive in effect. *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250; *Adams Mfg. Co.* v. *Storen*, 304 U. S. 307; *Gwin, White & Prince, Inc.* v. *Henneford*, 305 U. S. 434.

In the light of this principle, the difference between the New York City sales tax and the New York and California use taxes is of the utmost importance. The New York City sales tax is not a tax upon local use or ownership after the completion of the sale; it is a tax upon the transaction of sale. To sustain its application to interstate sales would open the door to the imposition of multiple burdens upon such sales. If the tax at bar were a tax imposed upon local use or ownership after interstate commerce has ended, as are the New York and California use taxes, it could be sustained without opening that door.

The use tax is designed to equalize the local tax burdens by covering goods purchased in extrastate and interstate transactions, transactions that are beyond the power of the state to reach by a sales tax. As to extrastate sales, such as for example a sale occurring in New Jersey, petitioner would not contend that the sales tax applies, for it would obviously be barred by the limitations of the due process clause as well as of the State Enabling Act. But he argues that the sales tax should nevertheless be applied to interstate sales

in order to accomplish the desired equality of burden as between these and local sales. What he overlooks is that this supposed equality is merely superficial; if the sales tax were applied to interstate sales it would in fact inevitably result in inequality as between local and interstate sales on account of the resulting additional tax burdens to which the interstate sales alone would be exposed in other states. This resulting inequality is the very basis of the decisions of this Court under the commerce clause. The use tax is the only tax that actually produces the desired equality among local, interstate and extrastate sales.

In the use tax cases, as well as in the *Western Live Stock*, *Adams Mfg. Co.* and *Gwin, White* cases, this Court undertook to draw with clarity and care the line between what is and what is not an unconstitutional burden upon interstate commerce. In arguing that the use tax cases are controlling here, petitioner is really asking the Court to redraw that line so as to subject to local taxation and to the danger of discriminatory burdens, transactions which are unquestionably interstate in character. This plea is placed upon three grounds, namely (1) the urgent need of the City for revenue for unemployment relief, (2) the need for preventing discrimination against local commerce in favor of interstate commerce, and (3) the need for preventing tax avoidance by the use of the protective cloak of the commerce clause.†

The principles laid down by this Court in interpreting the commerce clause have been established

† So far as the question of tax avoidance is concerned there is not the slightest basis for suggesting it in the present case. On the question of tax avoidance generally the governing principles are those applied in cases like *Superior Oil Co.* v. *Mississippi*, 280 U. S. 390, and *Graybar Electric Co.* v. *Curry*, 189 So. 186, affirmed 308 U. S.— , 84 L. Ed. 97 (Nov. 6, 1939). But aside from these principles the New York City use tax or a tax like the California use tax would adequately take care of that problem.

with all these factors in full view, and the way is clearly open to the City to accomplish all these objectives without challenging well-established principles. All these objectives may be more readily accomplished by the enforcement of the existing New York City property or use tax; and if the City regards the statute in its present form as inadequate, there is nothing to prevent its modification to conform to the California use tax. The revenue needs of the City, the need for preventing discrimination against local commerce, and the need for preventing tax avoidance are precisely the needs which the California use tax fully meets; and the New York City use tax is ready at hand to meet the same needs. The "practical, social and economic" questions posed by petitioner are really moot here because they may be more readily solved by the proper exercise of the City's present taxing powers under an existing statute without the necessity of enlarging those powers by overriding well-established constitutional principles.

Conclusion.

It is respectfully submitted that the judgment of the Court below should be affirmed; but in the event of an adverse decision upon the federal question here involved the case should be remanded to the New York Court of Appeals for consideration of the question as to the application of the New York State Enabling Act to those sales which were consummated by delivery outside the City of New York.

Respectfully submitted.

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APPENDIX A.

Summary of Pertinent Provisions of the Contracts Here Involved.

The record shows the terms of all the contracts covering sales to the 20 purchasers here involved during the period December 10, 1934 to December 31, 1935, but by stipulation between counsel and order of the Appellate Division many of these contracts have been omitted from the printed record because they are similar to others that are printed (R. 146-7). A summary of their pertinent provisions follows.

Public Utility Companies.

The New York Edison Company and United Electric Light & Power Company (Exhibit 12, R. 122-5; Exhibits 13-16 not printed).

The pertinent provisions of the contracts with these two companies are substantially identical in terms. The subject matter was "Standard Eureka run of mine B seam * * * bituminous coals *from the Seller's mines in Cambria and Somerset Counties, Pennsylvania*"† (R. 122). The coal was to be delivered alongside the Buyer's power stations. The Seller was "to furnish the Buyer a statement of the numbers of the railroad cars that go to make up each boat cargo, the size of coal contained in each car and *the mine from which it was shipped*" (R. 125). The coal was referred to as coal "to be delivered hereunder *from the above mines*" (R. 124). The prices agreed upon were stated to be "based on the present rates of Wages paid to miners and day laborers *at the above mine or mines of the Seller* and upon the present railroad freight rates *from these mines* to New York Tidewater", and provision was made for an adjustment in price in the exent of change in the wage rates or railroad freight rates (R. 124).

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† Italics ours in all contract excerpts.

Williamsburgh Power Plant Corporation (Exhibit 19, R. 127-30; Exhibit 20, not printed).

The subject matter of these contracts was "Berwind's Standard Eureka Run of Mine ('B' Seam) Coal *from the Seller's Mines*, located in Cambria and Somerset Counties, Pennsylvania", and the mines were designated as "Eureka Nos. 35, 36, 37, 40, 42 and Maryland Shaft Mine, owned and operated by The Berwind-White Coal Mining Company" (R. 128). The coal was to be delivered alongside the Williamsburgh Power Station, Brooklyn, New York. Provision was made for adjustment in the price upon any change in "the present railroad freight rates", the rate from the mines to Harsimus Pier for transshipment by water, fixed by the Interstate Commerce Commission (R. 129; *cf.* R. 58). Price adjustments were also required in the event of a change in wage rates "of mine employees in the district in which *the mines from which the said coal is shipped* are located" (R. 129).

Brooklyn Edison Company (Exhibit 17, R. 126-7; Exhibit 18 not printed).

These contracts called for delivery of "Berwind's Standard Eureka run of mine coal *from the Eureka mines located in Cambria and Somerset Counties at or near Windber, Pennsylvania*". Delivery was to be made alongside the Buyer's power stations (R. 126). The usual provision was made for an adjustment in price in the event of changes in existing wages and freight rates. All settlements with respect to weight of the coal were to be governed by the "Net weights, as determined by the railroad scales nearest loading point" (R. 126).

Interborough Rapid Transit Company (Exhibits 5-10, R. 110-21; Exhibit 11 not printed).

Each of the two formal contracts was preceded by a bid by respondent and an acceptance of the bid by Interborough. The invitation to bid stated that "Bids must be accompanied by an average or typical analysis of the coal proposed to be furnished, and must also specify the name of the producing mine, its location, latest yearly output, shipping point and route to New York" (R. 110). The bid submitted by respondent preceding the contract covering the period from April 1, 1934 to March 31, 1935 stated the subject matter as "Berwind's Eureka" coal (R. 111), accompanied by an analysis (R. 112); the source as "Mines Nos. 35, 36, 37, 40, 42 and Maryland Shaft, located at Windber, Somerset County, Pennsylvania" (R. 112); and the delivery conditions as similar to last year (R. 111), which meant "shipped from our mines in our own railway cars to Harsimus Pier, Jersey City, put into our barges and delivered alongside plant" (R. 33). This bid was accepted (R. 112-3). A similar bid and acceptance preceded the contract covering the periods from April 1, 1935, to March 31, 1936 (Exs. 9 and 10, R. 120-1). The formal contracts designated the coal as "Interborough Standard 'A' coal" (R. 113) and set forth a specific analysis (R. 117), the requirements of which are met by Berwind's Eureka coal (R. 34). The contracts stated that delivery was to be made free alongside Buyer's power stations (R. 115). They also contained certain provisions to provide for "contingencies or causes restricting the production or *shipment from the Seller's mines*" (R. 114), and provided for adjustment in price in the event of any increase or decrease in the railroad rates and vessel rates "for or in respect of *movement from mines*" to Buyer's power stations (R. 115-6). Weights were to be determined by "Vessel's bill-of-lading weight, as determined by Railroad Company over whose piers coal is dumped" (R. 116).

Steamship Companies.

All America Cables, Inc. and Others†
(Exhibit 27, R. 140-2; Exhibits 28-38 not printed).

The contracts with all the steamship companies listed in the footnote† were identical in form (Ex. 27, R. 140-2). Respondent was to supply during a period of one year "all the Bunker Coal normally required" for the use of Buyers' steamers. Delivery was to be made in New York harbor and other ports on the Atlantic seaboard. Only deliveries in New York harbor are here involved. With respect thereto the subject matter of all the contracts was "Berwind's Standard Eureka" coal, and the place of delivery was alongside steamer at her dock within harbor limits (R. 141). The price of the coal was to be subject "to any increase or decrease in Railway rates, or mining costs including adjustments in wages" (R. 142). This refers to the railroad freight rates fixed by the Interstate Commerce Commission for shipments from respondent's mines to Harsimus Pier, Jersey City, and the wages of miners at respondent's mines (R. 58).

Ocean Dominion Steamship Corporation (Exhibit 39, R. 143).

This contract provided that respondent was to supply the Buyer's "bunker requirements at the best prices and terms available to other steamship operators under annual contract or otherwise", deliveries to be made at New York and other ports. The coal delivered under this contract to the Buyer's steamers in New York harbor was Berwind's Eureka coal from respondent's mines in Pennsylvania, and it was delivered in accordance with the usual practice (R. 59-60).

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† All America Cables, Inc., Clyde-Mallory Lines, Compagnie Generale Transatlantique (French Line), International Mercantile Marine Company, New York & Porto Rico Steamship Company, Compania Transatlantique (Spanish Line).

North Atlantic & Gulf Steamship Company; Pioneer Terminal Corporation; U. S. Navigation Company (R. 58-9); Caddell Drydock & Repair Company (R. 50-1).

All coal for these companies during the period from December 10, 1934 to December 31, 1935 was delivered pursuant to spot contracts made orally. These contracts required the delivery of Eureka coal from respondent's mines alongside the Buyer's steamers in accordance with the usual delivery practice, and the coal was so delivered (R. 47-8).

New England Steamship Company (Exhibit 21, R. 130-1).

The coal delivered to this company by respondent during the period December 10, 1934 to December 31, 1935 was delivered pursuant to a written contract up to March 31, 1935 (Ex. 21, R. 130-1), and from April 1, 1935 to December 31, 1935 deliveries were made on a "spot basis" and "as a continuation of the contract expiring March 31", 1935 (R. 51). The written contract required delivery of a certain quantity of Berwind's Eureka run-of-mine coal "to be made to the New England Steamship Company at Harsimus Pier, Jersey City, N. J., in approximately equal monthly quantities" (R. 131). The usual provisions with respect to adjustment of the price in the event of an increase in wages at respondent's mines and changes in freight rates were included (R. 130-1). All deliveries to New England Steamship Company were made at Harsimus Pier, Jersey City, pursuant to these contracts (R. 44).

Industrial Companies.

Arbuckle Brothers (Exhibit 22, R. 131-4).

The subject matter was Berwind's C-prime coal from specified mines of respondent located in Somerset County,

Pennsylvania (R. 132, 49). Deliveries were required to be made in barges, alongside Buyer's plant at Adams Street, Brooklyn, New York (R. 132). Provision was made for adjustment in price on account of increase or decrease in the wages of mine employees in the district "in which *the mine or mines of the producer, from which the coal is shipped*, are located" (R. 133). Deliveries were made pursuant to the contract (R. 97).

L. A. Dreyfus Company (Exhibits 23 and 24, R. 134-9).

Under its contracts L. A. Dreyfus Company had the option to buy either Berwind's Eureka or Berwind's C-prime coal. All its purchases during the period here involved were of Berwind's C-prime coal (R. 49). The contracts were for a specified tonnage "less such amount as [respondent] is unable to ship * * * on account of any strike, accident, contingency of transportation, or cause or causes beyond the control of either party, affecting the *mining, shipment, transportation*, delivery or receipt of coal to be shipped under this agreement" (R. 134-5). Provision was made for adjustment in price in the event "of a general increase or decrease in wages in *the district in which the mine or mines of the producer, from which the coal is shipped*, are located" (R. 135). Shipments were required to be made to the Buyer at "Rosebank, Staten Island, New York, alongside docks within the harbor limits of New York" (R. 136). Deliveries were made pursuant to the contracts (R. 97-8).

Austin, Nichols & Co., Inc. (Exhibits 25 and 26, R. 139-40).

All sales to Austin, Nichols & Co. during the period in question were made pursuant to spot contracts requiring delivery of the coal to the Buyer on board cars at respondent's mines in Pennsylvania. All deliveries were to be made on board cars at the mines in Pennsylvania (R. 140-1), and were so made (R. 53).

APPENDIX B.

Local Law No. 25 of 1934 as Amended by Local Law No. 13 of 1935.†

A local law to amend local law number twenty-five of the year nineteen hundred and thirty-four to relieve the people of the city of New York from the hardships and suffering caused by unemployment and the effects thereof on the public health by the imposition of a tax upon certain personal property situated or owned within the city of New York.

Became a law May 11, 1935, with the approval of the Mayor. Passed by the local legislative body of the city of New York.

Be it enacted by the municipal assembly of the city of New York as follows:

Section 1. IMPOSITION OF TAX. During the period commencing on January first, nineteen hundred and thirty-five, and ending on December thirty-first, nineteen hundred and thirty-five, there shall be paid by the owner a tax of two per centum upon the value of the following-named articles of personal property situated or owned within the city of New York.

(a) Furs and fur products.

(b) Radios, automatic sound and musical reproduction devices, and all other musical instruments of any kind whatsoever.

(c) Automobiles, motor trucks, buses, airplanes, motor boats or any other type of motor vehicle or any part or parts for the same.

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† Printed as No. 26 in the official compilation entitled "Local Laws of the Cities in the State of New York enacted during the year 1934".

(d) Building materials, including all products or materials designed to be used or actually used for the affixation to or improvement of real property, including all materials accessory to such affixation or improvement such as pipes, conduits or any item or material used in any manner in building construction or in the improvement of real property within the city of New York.

(e) Machinery of every type and variety, including typewriters and all other business machinery and refrigerators and all other machinery or mechanical equipment for domestic use.

(f) Furniture and interior furnishings of every type and variety, including all objects used for the furnishing or decoration of the interior of home, office or commercial buildings.

(g) Jewelry, silverware, precious metals and precious stones.

(h) Glass and glass products.

(i) Paper and paper products.

(j) Food products not for human consumption.

(k) Oil, gas, gasoline and other combustibles.

(l) Wires and cables whether or not for construction purposes or the improvement of realty and other electrical supplies and equipment.

(m) Optical supplies of any nature or description.

§2. EXEMPTIONS. No tax, as imposed by section one of this title, shall be due or payable in any event upon any of the articles enumerated in the said section one, and no return need be made thereon pursuant to the provisions of this law if any of the following conditions be demonstrated to the satisfaction of the comptroller:

(a) That the said article was purchased prior to January first, nineteen hundred and thirty-five.

(b) That the total value of the article or articles purchased is less than one hundred dollars in value, except in the case of building materials and supplies, in which event the exemption of this sub-section shall not be applicable.

(c) That the said article is one upon the receipt from the sale of which a tax has been paid pursuant to the provisions of this law or local law number twenty of nineteen hundred and thirty-four, as amended.

(d) That the said article is a bona fide work of art.

(e) That the said article has been manufactured within the city of New York for sale by the manufacturer upon which sale a tax pursuant to local law number twenty of nineteen hundred and thirty-four, as amended, will be paid; or, that the said article constitutes a part of a dealer's stock and that such purchases are for the necessary requirements of the business within the city of New York and is owned only pending a sale upon which a tax pursuant to local law number twenty of nineteen hundred and thirty-four, as amended, will be paid.

§3. VALUATION. For the purposes of the tax levied by this local law, such articles of personal property as are subject to such tax shall be evaluated for taxing purposes at the actual purchase price, and if such purchase price is not available such valuation shall be made in such manner as the comptroller shall direct.

§4. TIME AT WHICH TAX IS DUE. The tax imposed by this local law shall be due and payable on April fifteenth, nineteen hundred and thirty-five, with respect to property acquired on or before March thirty-first, nineteen hundred and thirty-five; on July fifteenth, nineteen hundred and thirty-five, with respect to property acquired on or before June thirtieth, nineteen hundred and thirty-five; on October fifteenth, nineteen hundred and thirty-five, with respect to property acquired on or before September thirtieth, nineteen hundred and thirty-five; and on January fifteenth,

nineteen hundred and thirty-six, with respect to all other property subject to tax hereunder. In the event that such personal property subject to the tax imposed by this local law shall be destroyed or shall lose its identity by affixation to real estate or otherwise the whole tax imposed by this local law shall be due and payable at the time of such destruction or such loss of identity by affixation or otherwise.

§5. COLLECTION OF THE TAX. The comptroller shall by regulation prescribe a method or methods for the collection of the tax imposed by this local law from the persons liable for the same. Except as otherwise prescribed herein, the owner of such property shall in all cases be liable for the tax herein imposed.

§6. RETURNS. Every owner of personal property subject to the provisions of this local law shall file with the comptroller a return showing the amount of such personal property subject to such tax and the taxes payable thereon. Such return shall be filed on or before the date upon which such tax is due, and if such tax be paid upon the filing of such return, no penalty shall be assessed against such taxpayer.

§7. PAYMENT OF TAXES. In the event that the owner of personal property fails to file a return and pay the tax imposed by this law within the time aforesaid set forth, each prior owner of such personal property subject to such tax whose ownership has been acquired or has extended over such property during the year nineteen hundred and thirty-five, shall be liable for such tax in full, and if the property has been subject to the ownership of several such persons during the year nineteen hundred and thirty-five such liability shall be in inverse order of the order of ownership, and upon default of payment of the tax by any owner subsequent in time the comptroller may proceed against any owner prior in time, unless during the ownership of such prior owner such property was not within the classification of property upon which this tax is imposed.

§8. Determination of Tax by the Comptroller. If a return required by this local law is not filed, or if a return when filed is incorrect or insufficient, the comptroller shall determine the amount of the tax due from such information as he may be able to obtain. The comptroller shall give notice of such determination to the person liable for the payment of the tax. Such determination shall finally and irrevocably fix the tax unless the person against whom it is assessed shall within thirty days apply to the comptroller for a hearing on such determination and shall deposit the full amount of such tax, with all penalties, with the comptroller, in which case the said determination shall be suspended until after such hearing as the comptroller, or his duly designated representative may grant.

§9. Proceeding to Recover Tax. Whenever any person shall fail to collect and pay over any tax and/or to pay any tax or penalty imposed by this local law as in this local law provided, the corporation counsel shall, upon the request of the comptroller, bring an action to enforce payment of the same.

As an additional or alternate remedy, the comptroller may issue a warrant, directed to the sheriff of any county within the city of New York, commanding him to levy upon and sell the real and personal property of such person which may be found within his county, for the payment of the amount thereof, with any penalties, and the cost of executing the warrant, and to return such warrant to the comptroller and to pay to him the money collected by virtue thereof within sixty days after the receipt of such warrant. The sheriff shall within five days after the receipt of the warrant file with the clerk of his county a copy thereof, and thereupon such clerk shall enter in the judgment docket the name of the person mentioned in the warrant and the amount of the tax and penalties for which the warrant is issued and the date when such copy is filed. Thereupon the amount of such warrant so docketed shall become a lien upon the title to and interest in real and personal property of the person against whom the warrant

is issued in the same manner as a judgment duly docketed in the office of such clerk. The sheriff shall then proceed upon the warrant in the same manner, and with like effect, as that provided by law in respect to executions issued against property upon judgments of a court of record, and for services in executing the warrant he shall be entitled to the same fees, which he may collect in the same manner. In the discretion of the comptroller a warrant of like terms, force and effect may be issued and directed to any officer or employee of the department of finance, and in the execution thereof such officer or employee shall have all the powers conferred by law upon sheriffs, but he shall be entitled to no fee or compensation in excess of the actual expenses paid in the performance of such duty. If a warrant is returned not satisfied in full, the comptroller may from time to time issue new warrants and shall also have the same remedies to enforce the amount due thereunder as if the city of New York had recovered judgment therefor and execution thereon had been returned unsatisfied.

§10. General Powers of the Comptroller. In addition to the powers granted to the comptroller in this local law, he is hereby authorized and empowered:

(a) To make, adopt and amend rules and regulations appropriate to the carrying out of this local law and the purposes thereof;

(b) To extend, for cause shown, the time for filing any return for a period not exceeding thirty days; and for cause shown, to remit penalties and interest; and to compromise disputed claims in connection with the taxes hereby imposed;

(c) To assess, revise, readjust and impose the taxes authorized to be imposed under this local law;

(d) To delegate his functions hereunder to a deputy comptroller or other employee or employees of the department of finance of the city of New York.

§11. ADMINISTRATION OF OATHS AND COMPELLING TESTIMONY. The comptroller or his employee duly designated and authorized by the comptroller shall have power to administer oaths and take affidavits in relation to any matter or proceeding in the exercise of the powers and duties of the comptroller under this local law. The comptroller shall have power to subpoena and require the attendance of witnesses and the production of books, papers and documents to secure information pertinent to the performance of his duties hereunder and of the enforcement of this local law, and to examine them in relation thereto, and to issue commissions for the examination of witnesses who are out of the state or unable to attend before him or excused from attendance.

A justice of the supreme court either in court or at chambers shall have power summarily to enforce by proper proceedings the attendance and testimony of witnesses and the production and examination of books, papers and documents called for by the subpoena of the comptroller hereunder.

Any person who shall refuse to testify or to produce books or records or who shall testify falsely in any material matter pending before the comptroller hereunder shall be guilty of a misdemeanor, and punishment for which shall be a fine of not more than one thousand dollars or imprisonment for not more than one year, or both such fine and imprisonment.

The officers who serve the comptroller's summons or subpoena hereunder and witnesses attending in response thereto shall be entitled to the same fees as are allowed to officers and witnesses in civil cases in courts of record, except as herein otherwise provided.

§12. PENALTIES. Any person failing to file a return or to pay over any tax to the comptroller within the time required by this local law shall be subject to a penalty of ten per centum of the amount of tax due, plus five per centum of such tax for each month of delay or fraction thereof excepting the first month after such return was

required to be filed or such tax became due; but the comptroller, if satisfied that the delay was excusable, may remit all or any part of such penalty. Such penalty shall be paid and disposed of in the same manner as other revenues from this local law. Unpaid penalties may be enforced in the same manner as the tax imposed by this local law.

Any person and any officer of a corporation or copartner filing or causing to be filed any return, certificate, affidavit or statement required or authorized by this local law which is wilfully false and any person who shall fail to file a return as required under this local law, and the officers of any corporation which shall so fail, shall be guilty of a misdemeanor, punishment for which shall be a fine of not more than one thousand dollars or imprisonment for not more than one year, or both such fine and imprisonment.

§13. Disposition of Revenues. All revenues and monies resulting from the imposition of the taxes imposed by this local law shall be paid into the treasury of the city of New York and shall not be credited or deposited in the general fund of the city of New York, but shall be deposited in a separate bank account or accounts, and shall be available and used solely and exclusively for the purpose of relieving the people of the city of New York from the hardships and suffering caused by unemployment, including the repayment of monies borrowed or to be borrowed in anticipation of this tax.

§14. Application; Construction. If any provision of this local law, or the application thereof to any person or circumstances, is held invalid, the remainder of this local law, and the application of such provisions to other persons or circumstances shall not be affected thereby. This local law shall be construed in conformity with chapter eight hundred seventy-three, laws of nineteen hundred and thirty-four, pursuant to which it is enacted.

§15. Effective Date of Local Law. This local law shall take effect immediately.

P. 12, 4,

SUPREME COURT OF THE UNITED STATES.

No. 475.—October Term, 1939.

Joseph D. McGoldrick, Comptroller of the City of New York, Petitioner,
vs.
Berwind-White Coal Mining Company.

On Writ of Certiorari to the Supreme Court of the State of New York.

[January 29, 1940.]

Mr. Justice Stone delivered the opinion of the Court.

The question for decision is whether the New York City tax laid upon sales of goods for consumption, as applied to respondent, infringes the commerce clause of the Federal Constitution.

Upon certiorari to review a determination by the Comptroller of the City of New York that respondent was subject to New York City sales tax in the sum of $176,703, the Appellate Division of the New York Supreme Court held that the taxing statute as applied to respondent does so infringe, 255 App. Div. 961, on the authority of *Matter of National Cash Register Co.* v. *Taylor*, 276 N. Y. 208, cert. den., 303 U. S. 656; *Matter of Compagnie Generale Transatlantique v. McGoldrick*, 279 N. Y. 192. The New York Court of Appeals affirmed without opinion, 281 N. Y. 94, but its amended remittitur declared that the affirmance was upon the sole ground that the taxing statute as applied violated the commerce clause. We granted certiorari December 4, 1939, the question presented being of public importance, upon a petition which challenged the decision of the state court as not in accord with applicable decisions of this Court in *Banker Brothers* v. *Pennsylvania*, 222 U. S. 210; *Wiloil Corporation* v. *Pennsylvania*, 294 U. S. 169.

Chapter 815 of the New York Laws of 1933, as amended by Chapter 873 of the New York Laws of 1934, authorized the City of New York, for a limited period within which the present tax was laid, "to adopt and amend local laws imposing in . . . [the] city any tax which the legislature has or would have power and authority to impose". It directed that "a tax imposed hereunder shall have application only within the territorial limits" of the city; and that "this Act shall not authorize the imposition of a tax on any

transaction originating and/or consummated outside of the territorial limits of . . . [the] city, notwithstanding that some act be necessarily performed with respect to such transaction within such limits". It required the revenues from the tax to be used exclusively for unemployment relief.

Pursuant to this authority the municipal assembly of the City of New York adopted Local Law No. 24 of 1934 (published as Local Law No. 25), since, annually renewed, which laid a tax upon purchasers for consumption of tangible personal property generally (except foods and drugs furnished on prescription), of utility services in supplying gas, electricity, telephone service, etc., and of meals consumed in restaurants. By § 2 the tax was fixed at "two percentum upon the amount of the receipts from every sale in the City of New York", "sale" being defined by § 1(e) as "any transfer of title or possession, or both . . . in any manner or by any means whatsoever for a consideration or any agreement therefor". Another clause of § 2[1] commands that the tax "shall be paid by the purchaser to the vendor for and on account of the City of New York". By the same clause the vendor, who is authorized to collect the tax, is required to charge it to the purchaser, separately from the sales price; and is made liable, as an insurer, for its payment to the city. By §§ 4 and 5 the vendor is required to keep records and file returns showing the amount of the receipts from sales and the amount of the tax. In event of its nonpayment to the seller the buyer is required, within fifteen days after his purchase, to file a tax return and to pay the tax to the Comptroller who is authorized by § 2 to set up a procedure for the collection of the tax from the purchaser. Purchases for resale are exempt from the tax, and a purchaser who pays the tax and later resells is entitled to a refund.

The ultimate burden of the tax, both in form and in substance, is thus laid upon the buyer, for consumption, of tangible personal

1 "Upon each taxable sale or service the tax to be collected shall be stated and charged separately from the sale price or charge for service and shown separately on any record thereof, at the time when the sale is made or evidence of sale issued or employed by the vendor and shall be paid by the purchaser to the vendor, for and on account of the city of New York, and the vendor shall be liable for the collection or the service rendered; and the vendor shall have the same right in respect to collecting the tax from the purchaser, or in respect to non-payment of the tax by the purchaser, as if the tax were a part of the purchase price of the property or service and payable at the time of the sale."

property, and measured by the sales price. Only in event that the seller fails to pay over to the city the tax collected or to charge and collect it as the statute requires, is the burden cast on him. It is conditioned upon events occurring within the state, either transfer of title or possession of the purchased property, or an agreement within the state, "consummated" there, for the transfer of title, or possession. The duty of collecting the tax and paying it over to the Comptroller is imposed on the seller in addition to the duty imposed upon the buyer to pay the tax to the Comptroller when not so collected. Such, in substance, has been the construction of the statute by the state courts. *Matter of Atlas Television Co., Inc.*, 273 N. Y. 51; *Matter of Merchants Refrigerating Co.* v. *Taylor*, 275 N. Y. 113; *Matter of Kesbec, Inc.* v. *McGoldrick*, 278 N. Y. 293.

Respondent, a Pennsylvania corporation, is engaged in the production of coal of specified grades, said to possess unique qualities, from its mines within that state and in selling it to consumers and dealers. It maintains a sales office in New York City and sells annually to its customers, 1,500,000 tons of its product, of which approximately 1,300,000 tons are delivered by respondent to some twenty public utility and steamship companies. The coal moves by rail from mine to dock in Jersey City, thence in most instances by barge to the point of delivery. All the sales contracts with the New York customers in question were entered into in New York City, and with two exceptions, presently to be considered separately, call for delivery of the coal by respondent by barge, alongside the purchasers' plants or steamships. In many instances the price of the coal was stated to be subject to any increase or decrease of mining costs including wages, and of railroad rates between the mines and the Jersey City terminal to which the coal was to be shipped. All the deliveries, with the exceptions already noted, were made within New York City, and all such are concededly subject to the tax except insofar as it infringes the commerce clause.

Section 8 of the Constitution declares that "Congress shall have power . . . . to regulate commerce with foreign Nations, and among the several States. . . . ." In imposing taxes for state purposes a state is not exercising any power which the Constitution has conferred upon Congress. It is only when the tax operates to regulate commerce between the states or with foreign nations to

an extent which ~~impairs~~ infringes the authority conferred upon Congress, that the tax can be said to exceed constitutional limitations. See *Gibbons* v. *Ogden*, 9 Wheat. 1, 187; *South Carolina Highway Dept.* v. *Barnwell Bros.*, 303 U. S. 177, 185. Forms of state taxation whose tendency is to prohibit the commerce or place it at a disadvantage as compared or in competition with intrastate commerce and any state tax which discriminates against the commerce, are familiar examples of the exercise of state taxing power in an unconstitutional manner, because of its obvious regulatory effect upon commerce between the states.[2]

But it was not the purpose of the commerce clause to relieve those engaged in interstate commerce of their just share of state tax

[2] Despite mechanical or artificial distinctions sometimes taken between the taxes deemed permissible and those condemned, the decisions appear to be predicated on a practical judgment as to the likelihood of the tax being used to place interstate commerce at a competitive disadvantage. See Galveston, H. & S. A. R. Co. v. Texas, 210 U. S. 217, 227. License taxes requiring a corporation engaged in interstate commerce to pay a fee of a certain percentage of its capital stock have been rejected because of the danger that each state in which the corporation does business may impose a similar tax, measured by its interstate business in all, Western Union v. Kansas, 216 U. S. 1; Atchison, T. & S. F. Ry. Co. v. O'Connor, 223 U. S. 280; Looney v. Crane, 245 U. S. 178; International Paper Co. v. Massachusetts, 246 U. S. 135, and have only been sustained when apportioned to that part of the capital thought to be attributable to an intrastate activity. National Leather Co. v. Massachusetts, 277 U. S. 413; International Shoe Co. v. Shartel, 279 U. S. 429; Ford Motor Co. v. Beauchamp, No. 17, October Term, 1939, decided December 11, 1939. Privilege taxes requiring a percentage of the gross receipts from interstate transportation or from other activities in carrying on the movement of that commerce, which if sustained, could be imposed wherever the interstate activity occurs, have been struck down for similar reasons. Fargo v. Michigan, 121 U. S. 230; Philadelphia & S. Steamship Co. v. Pennsylvania, 122 U. S. 326; Leloup v. Mobile, 127 U. S. 640; Galveston, H. & S. A. R. Co. v. Texas, 210 U. S. 217, cf. Gwin, White & Prince v. Henneford, 305 U. S. 434. Fixed-sum license fees, regardless of the amount, for the privilege of carrying on the commerce, have been thought likely to be used to overburden the interstate commerce, McCall v. People, 136 U. S. 104; Crutcher v. Kentucky, 141 U. S. 47; Barrett v. New York, 232 U. S. 14; Texas Transportation & Terminal Co. v. New Orleans, 264 U. S. 150. Taxation of articles in course of their movement in interstate commerce is similarly foreclosed. Case of State Freight Tax, 13 Wall. 232; Champlain Realty Co. v. Brattleboro, 260 U. S. 366; Hughes Bros. Co. v. Minnesota, 272 U. S. 469; Carson Petroleum Co. v. Vial, 279 U. S. 95. See Henderson, The Position of Foreign Corporations in American Constitutional Law, 117; Powell, Indirect Encroachment on Federal Authority by the Taxing Power of the States, 31 Harv. L. Rev. 321, 572, 721, 932; 32 Harv. L. Rev. 234, 374, 634, 902. Lying back of these decisions is the recognized danger that, to the extent that the burden falls on economic interests without the state, it is not likely to be alleviated by those political restraints which are normally exerted on legislation where it affects adversely interests within the state. See Robbins v. Shelby County Taxing District, 120 U. S. 489, 499; South Carolina Highway Dept. v. Barnwell Bros., 303 U. S. 177, 185, Note 2; cf. McCulloch v. Maryland, 4 Wheat. 316; Helvering v. Gerhardt, 304 U. S. 405, 412.

burdens, merely because an incidental or consequential effect of the tax is an increase in the cost of doing the business, *Western Live Stock* v. *Bureau*, 303 U. S. 250, 254. Not all state taxation is to be condemned because, in some manner, it has an effect upon commerce between the states, and there are many forms of tax whose burdens, when distributed through the play of economic forces, affect interstate commerce, which nevertheless fall short of the regulation of the commerce which the Constitution leaves to Congress. A tax may be levied on net income wholly derived from interstate commerce.[3] Non-discriminatory taxation of the instrumentalities of interstate commerce is not prohibited.[4] The like taxation of property, shipped interstate, before its movement begins,[5] or after it ends,[6] is not a forbidden regulation. An excise for the warehousing of merchandise preparatory to its interstate shipment or upon its use,[7] or withdrawal for use,[8] by the consignee after the interstate journey has ended is not precluded. Nor is taxation of a local business or occupation which is separate and distinct from the transportation or intercourse which is interstate commerce, forbidden merely because in the ordinary course such transportation or intercourse is induced or occasioned by such business, or is prerequisite to it. *Western Live Stock* v. *Bureau, supra,* 253, and cases cited.

In few of these cases could it be said with assurance that the local tax does not in some measure affect the commerce or increase the cost of doing it. But in them as in other instances of constitutional interpretation so as to insure the harmonious opera-

[3] United States Glue Co. *v.* Oak Creek, 247 U. S. 321; Underwood Typewriter Co. *v.* Chamberlain, 254 U. S. 113; Atlantic Coast Line R. Co. *v.* Daughton, 262 U. S. 413; Matson Navigation Co. *v.* State Board, 297 U. S. 441.

[4] Adams Express Co. *v.* Ohio, 165 U. S. 194; Wells, Fargo & Co. *v.* Nevada, 248 U. S. 165; St. Louis & E. St. L. R. *v.* Missouri, 256 U. S. 314; Southern Ry. *v.* Watts, 260 U. S. 519.

[5] Coe *v.* Errol, 116 U. S. 517; Bacon *v.* Illinois, 227 U. S. 504; Heisler *v.* Thomas Colliery Co., 260 U. S. 245; Minnesota *v.* Blasius, 290 U. S. 1. *Cf.* Hope Natural Gas Co. *v.* Hall, 274 U. S. 284.

[6] Brown *v.* Houston, 114 U. S. 622; Pittsburgh & So. Coal Co. *v.* Bates, 156 U. S. 577; American Steel & Wire Co. *v.* Speed, 192 U. S. 500; General Oil Co. *v.* Crain, 209 U. S. 211.

[7] Federal Compress & Warehouse Co. *v.* McLean, 291 U. S. 17; Chassaniol *v.* Greenwood, 291 U. S. 584.

[8] Eastern Air Transport, Inc. *v.* South Carolina, 285 U. S. 147; Gregg Dyeing Co. *v.* Query, 286 U. S. 472; Nashville, C. & St. L. Ry. Co. *v.* Wallace, 288 U. S. 249; Edelman *v.* Boeing Air Transport, Inc., 289 U. S. 249.

tion of powers reserved to the states with those conferred upon the national government, courts are called upon to reconcile competing constitutional demands, that commerce between the states shall not be unduly impeded by state action, and that the power to lay taxes for the support of state government shall not be unduly curtailed. See *Woodruff* v. *Parham*, 8 Wall. 123, 131; *Brown* v. *Houston*, 114 U. S. 622; *Galveston, H. & S. A. R. Co.* v. *Texas*, 210 U. S. 217, 225, 227; *South Carolina Highway Dept.* v. *Barnwell Bros., supra; Ford Motor Co.* v. *Beauchamp*, No. 17, October Term, 1939, decided December 11, 1939; cf. *Metcalf & Eddy* v. *Mitchell*, 269 U. S. 514, 523, *et seq.; Board of County Comm'rs Jackson County, Kansas* v. *United States*, No. 14, October Term, 1939, decided December 18, 1939.

Certain types of tax may, if permitted at all, so readily be made the instrument of impeding or destroying interstate commerce as plainly to call for their condemnation as forbidden regulations. Such are the taxes already noted which are aimed at or discriminate against the commerce or impose a levy for the privilege of doing it, or tax interstate transportation or communication or their gross earnings, or levy an exaction on merchandise in the course of its interstate journey. Each imposes a burden which intrastate commerce does not bear, and merely because interstate commerce is being done places it at a disadvantage in comparison with intrastate business or property in circumstances such that if the asserted power to tax were sustained, the states would be left free to exert it to the detriment of the national commerce.

The present tax as applied to respondent is without the possibility of such consequences. Equality is its theme, cf. *Henneford* v. *Silas Mason Co.*, 300 U. S. 577, 583. It does not aim at or discriminate against interstate commerce. It is laid upon every purchaser, within the state, of goods for consumption, regardless of whether they have been transported in interstate commerce. Its only relation to the commerce arises from the fact that immediately preceding transfer of possession to the purchaser within the state, which is the taxable event regardless of the time and place of passing title, the merchandise has been transported in interstate commerce and brought to its journey's end. Such a tax has no different effect upon interstate commerce than a tax on the "use" of property which has just been moved in interstate commerce

sustained in *Monamotor Oil Co.* v. *Johnson*, 292 U. S. 86; *Henneford* v. *Silas Mason Co.*, *supra*; *Felt & Tarrant Mg. Co.* v. *Gallagher*, 306 U. S. 62; *Southern Pacific Co.* v. *Gallagher*, 306 U. S. 167, or the tax on storage or withdrawal for use by the consignee of gasoline, similarly sustained in *Gregg Dyeing Co.* v. *Query*, 286 U. S. 472; *Nashville, C. & St. L. Ry. Co.* v. *Wallace*, 288 U. S. 249; *Edelman* v. *Boeing Air Transport Co.*, 289 U. S. 249, or the familiar property tax on goods by the state of destination at the conclusion of their interstate journey. *Brown* v. *Houston*, *supra*; *American Steel & Wire Co.* v. *Speed*, 192 U. S. 500.

If, as guides to decision we look to the purpose of the commerce clause to protect interstate commerce from discriminatory or destructive state action, and at the same time to the purpose of the state taxing power under which interstate commerce admittedly must bear its fair share of state tax burdens, and to the necessity of judicial reconciliation of these competing demands, we can find no adequate ground for saying that the present tax is a regulation which, in the absence of Congressional action the commerce clause forbids.[9] This Court has uniformly sustained a tax imposed by the state of the buyer upon a sale of goods, in several instances in the "original package", effected by delivery to the purchaser upon arrival at destination after an interstate journey, both when the local seller has purchased the goods extra-state for the purpose of resale, *Woodruff* v. *Parham*, *supra*; *Hinson* v. *Lott*, 8 Wall. 148; *Banker Bros.* v. *Pennsylvania*, *supra*; *Wiloil Corp.* v. *Pennsylvania*, *supra*; *Graybar Electric Co.* v. *Curry*, 308 U. S. —; — Ala. —, November 6, 1939, and when the extra-state seller has shipped them into the taxing state for sale there. *Hinson* v. *Lott*, *supra*; *Sonneborn Bros.* v. *Cureton*, 262 U. S. 506. It has likewise sustained a fixed-sum license tax imposed on the agent of the interstate seller for the privilege of selling merchandise brought into the taxing state for the purpose of sale. *Machine Co.* v. *Gage*, 100 U. S. 676; *Emert* v. *Missouri*, 156 U. S. 296; *Kehrer* v. *Stewart*, 197 U. S. 60; *Baccus* v. *Louisiana*, 232 U. S. 334; *Wagner* v. *Covington*, 251 U. S. 95.

The only challenge made to these controlling authorities is by reference to unconstitutional "burdens" on interstate commerce

[9] The imposition on the seller of the duty to insure collection of the tax from the purchaser does not violate the commerce clause. See Monamotor Oil Co. *v.* Johnson, *supra*; Felt & Tarrant Mfg. Co. *v.* Gallagher, *supra*.

made in general statements which are inapplicable here because they are torn from their setting in judicial opinions and speak of state regulations or taxes of a different kind laid in different circumstances from those with which we are now concerned. See for example, *Galveston, H. & S. A. R. Co.* v. *Texas, supra; Cooney* v. *Mountain States Telephone Co.*, 294 U. S. 384; *Fisher's Blend Station* v. *Tax Commission*, 297 U. S. 650. Others will presently be discussed. But unless we are now to reject the plain teaching of this line of sales tax decisions, extending back for more than seventy years from *Graybar Electric Co.* v. *Curry, supra*, decided this term, to *Woodruff* v. *Parham, supra*, the present tax must be upheld. As we have seen, the ruling of these decisions does not rest on precedent alone. It has the support of reason and of a due regard for the just balance between national and state power. In sustaining these taxes on sales emphasis was placed on the circumstances that they were not so laid, measured or conditioned as to afford a means of obstruction to the commerce or of discrimination against it, and that the extension of the immunity of the commerce clause contended for would be at the expense of state taxing power by withholding from taxation property and transactions within the state without the gain of any needed protection to interstate commerce. *Woodruff* v. *Parham, supra*, 137, 140; *Hinson* v. *Lott, supra*, 152; *Sonneborn Bros.* v. *Cureton, supra*, 513, 514, 521; *Wiloil Corp.* v. *Pennsylvania, supra*, 174; cf. *Brown* v. *Houston, supra*; *Henneford* v. *Silas Mason Co., supra*, 583.[10]

[10] In all of these cases, except Henneford v. Silas Mason Co., *supra*, the taxed sale was of merchandise in the "original package", although the original package doctrine had been thought to be a "positive and absolute" limitation on the exercise of state power. American Steel & Wire Co. v. Speed, 192 U. S. 500, 521. The doctrine originated in Brown v. Maryland, 12 Wheat. 419, where a discriminatory tax on imports was involved. It was overthrown as to interstate commerce when the court found that it would be unjust to permit the merchant who engaged in interstate commerce to escape a tax which the state had levied on the sale of goods after their interstate shipment, but with equal justice on all merchants. Woodruff v. Parham, 8 Wall. 123; Hinson v. Lott, 8 Wall. 148. After its supposed recrudescence in Leisy v. Hardin, 135 U. S. 100, the opinions of Justice Miller in Woodruff v. Parham, *supra*, and of Justice Bradley in Brown v. Houston, 114 U. S. 622, were explained by Chief Justice (then Justice) White in American Steel & Wire Co. v. Speed, *supra*, at 521, as the recognition by the court that the question was not whether "interstate commerce was to be considered as having completely terminated", but whether a particular exertion of taxing power by a state "so operated upon interstate commerce as to amount to a regulation thereof, in conflict with the paramount authority conferred upon Congress." He pointed out that the Court in these cases "conceded that the goods which

Apart from these more fundamental considerations which we think are of controlling force in the application of the commerce clause, we can find no adequate basis for distinguishing the present tax laid on the sale or purchase of goods upon their arrival at destination at the end of an interstate journey from the tax which may be laid in like fashion on the property itself. That the latter is a permissible tax has long been established by an unwavering line of authority. *Brown* v. *Houston, supra; Coe* v. *Errol,* 116 U. S. 517; *Pittsburgh & So. Coal Co.* v. *Bates,* 156 U. S. 577; *American Steel & Wire Co.* v. *Speed, supra,* 520; *General Oil Co.* v. *Crain,* 209 U. S. 211; *Bacon* v. *Illinois,* 227 U. S. 504. As we have often pointed out, there is no distinction in this relationship between a tax on property, the sum of all the rights and powers incident to ownership, and the taxation of the exercise of some of its constituent elements. *Nashville, Chattanooga & St. Louis Ry. Co.* v. *Wallace, supra,* 267, 268; *Henneford* v. *Silas Mason Co., supra,* 582; cf. *Bromley* v. *McCaughn,* 280 U. S. 124, 136-138. If coal situated as that in

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were taxed had not completely lost their character as interstate commerce since they had not been sold in the original package. As however they had arrived at their destination, were at rest in the state, were enjoying the protection which the laws of the state afforded, and were taxed without discrimination like all other property, it was held that the tax did not amount to a regulation in the sense of the Constitution, although its levy might remotely and indirectly affect interstate commerce." Cf. Cardozo, J., in Baldwin *v.* Seelig, 294 U. S. 511, 526:

"The test of the 'original package,' which came into our law with Brown *v.* Maryland, 12 Wheat. 419, is not inflexible and final for the transactions of interstate commerce, whatever may be its validity for commerce with other countries. Cf. Woodruff *v.* Parham, *supra;* Anglo-Chilean Nitrate Sales Corp. *v.* Alabama, 288 U. S. 218, 226. There are purposes for which merchandise, transported from another state, will be treated as a part of the general mass of property at the state of destination though still in the original containers. This is so, for illustration, where merchandise so contained is subjected to a non-discriminatory property tax which it bears equally with other merchandise produced within the state. Sonneborn Bros. *v.* Cureton, 262 U. S. 506; Texas Co. *v.* Brown, 258 U. S. 466, 475; American Steel & Wire Co. *v.* Speed, 192 U. S. 500. . . . 'A state tax upon merchandise brought in from another State, or upon its sales, whether in original packages or not, after it has reached its destination and is in a state of rest, is lawful only when the tax is not discriminating in its incidence against the merchandise because of its origin in another State.' Sonneborn Bros. *v.* Cureton, *supra,* at p. 516. Cf. Bowman *v.* Chicago & N. W. Ry. Co., 125 U. S. 564, 491; . . . In brief, the test of the original package is not an ultimate principle. It is an illustration of a principle. Pennsylvania Gas Co. *v.* Public Service Comm'n, 225 N. Y. 397, 403; 122 N. E. 260. It marks a convenient boundary and one sufficiently precise save in exceptional conditions. What is ultimate is the principle that one state in its dealings with another may not place itself in a position of economic isolation. Formulas and catchwords are subordinate to this overmastering requirement."

the present case, was, before its delivery, subject to a state property tax, see *Brown* v. *Houston, supra; Pittsburgh & So. Coal Co.* v. *Bates, supra;* transfer of possession of the coal upon a sale is equally taxable, see *Wiloil Corporation* v. *Pennsylvania, supra,* 175, just as was the storage or use of the property in similar circumstances held taxable in *Nashville, Chattanooga & St. L. R. Co.* v. *Wallace, supra; Henneford* v. *Silas Mason Co., supra.*

Respondent, pointing to the course of its business and to its contracts which contemplate the shipment of the coal interstate upon orders of the New York customers, insists that a distinction is to be taken between a tax laid on sales made, without previous contract, after the merchandise has crossed the state boundary, and sales, the contracts for which when made contemplate or require the transportation of merchandise interstate to the taxing state. Only the sales in the state of destination in the latter class of cases, it is said, are protected from taxation by the commerce clause, a qualification which respondent concedes is a salutary limitation upon the reach of the clause since its use is thus precluded as a means of avoiding state taxation of merchandise transported to the state in advance of the purchase order or contract of sale.

But we think this distinction is without the support of reason or authority. A very large part, if not most of the merchandise sold in New York City, is shipped interstate to that market. In the case of products like cotton, citrus fruits and coal, not to mention many others which are consumed there in vast quantities, all have crossed the state line to seek a market, whether in fulfillment of a contract or not. That is equally the case with other goods sent from without the state to the New York market, whether they are brought into competition with like goods produced within the state or not. We are unable to say that the present tax, laid generally upon all sales to consumers within the state, subjects the commerce involved where the goods sold are brought from other states, to any greater burden or affects it more, in any economic or practical way, whether the purchase order or contract precedes or follows the interstate shipment. Since the tax applies only if a sale is made, and in either case the object of interstate shipment is a sale at destination, the deterrent effect of the tax would seem to be the same on both. Restriction of the scope of the commerce clause so as to

prevent recourse to it as a means of curtailing state taxing power seems as salutary in the one case as in the other.

True, the distinction has the support of a statement *obiter* in *Sonneborn Bros.* v. *Cureton, supra,* 515, and seems to have been tacitly recognized in *Ware & Leland* v. *Mobile County,* 209 U. S. 405, 412, and *Banker Bros. Co.* v. *Pennsylvania, supra,* although in each case a tax on the sale of goods brought into the state for sale was upheld. But we have sustained the tax where the course of business and the agreement for sale plainly contemplated the shipment interstate in fulfilment of the contract. *Wiloil Corporation* v. *Pennsylvania, supra,* 173; *Graybar Electric Co.* v. *Curry, supra.* In the same circumstances the Court has upheld a property tax on the merchandise transported, *American Steel Wire Co.* v. *Speed, supra; General Oil Co.* v. *Crain, supra;* see *Bacon* v. *Illinois, supra,* 515, 516; upon its use, *Monamotor Oil Co.* v. *Johnson, supra; Felt & Tarrant Co.* v. *Gallagher, supra,* and upon its storage; cf. *Gregg Dyeing Co.* v. *Query, supra; Nashville, C. & St. L. Ry. Co.* v. *Wallace, supra.* Taxation of property or the exercise of a power over it immediately preceding its previously contemplated shipment interstate has been similarly sustained. *Coe* v. *Errol, Bacon* v. *Illinois, supra; Federal Compress & Warehouse Co.* v. *McLean,* 291 U. S. 17. For reasons already indicated all such taxes upon property or the exercise of the powers of ownership stand in no different relation to interstate commerce and have no different effect upon it than has the present sales tax upon goods whose shipment interstate into the taxing state was contemplated when the contract was entered into.

It is also urged that the conclusion which we reach is inconsistent with the long line of decisions of this Court following *Robbins* v. *Shelby County Taxing District,* 120 U. S. 489, which have held invalid, license taxes to the extent that they have sought to tax the occupation of soliciting orders for the purchase of goods to be shipped into the taxing state. In some instances the tax appeared to be aimed at suppression or placing at a disadvantage this type of business when brought into competition with competing intrastate sales. See *Robbins* v. *Shelby County Taxing District, supra,* 498; *Caldwell* v. *North Carolina,* 187 U. S. 622, 632.[11] In all, the statute,

[11] When the Robbins case was decided, sixteen states required the payment of license taxes by some kinds of drummers. For citations of the

in its practical operation, was capable of use, through increase in the tax, and in fact operated to some extent to place the merchant thus doing business interstate at a disadvantage in competition with untaxed sales at retail stores within the state. While a state, in some circumstances may, by taxation suppress or curtail one type of intrastate business to the advantage of another type of competing business which is left untaxed, see *Puget Sound Power & Light Co.* v. *Seattle*, 291 U. S. 619, 625, and cases cited, it does not follow that interstate commerce may be similarly affected by the practical operation of a state taxing statute. Compare *Hammond Packing Co.* v. *Montana*, 233 U. S. 331, *Magnano Co.* v. *Hamilton*, 292 U. S. 40, with *Schollenberger* v. *Pennsylvania*, 171 U. S. 1; *Robbins* v. *Shelby County Taxing District, supra; Sprout* v. *South Bend* 277 U. S. 163. It is enough for present purposes that the rule of *Robbins* v. *Shelby County Taxing District, supra*, has been narrowly limited to fixed-sum license taxes imposed on the business of soliciting orders for the purchase of goods to be shipped interstate. Compare *Robbins* v. *Shelby County Taxing District, supra*, with *Ficklen* v. *Shelby County Taxing District*, 145 U. S. 1, see *Machine Co.* v. *Gage, supra; Wagner* v. *Covington, supra;* and that the actual and potential effect on the commerce as such a tax is wholly wanting in the present case.

Finally it is said that the vice of the present tax is that it is measured by the gross receipts from interstate commerce and thus in effect reaches for taxation the commerce carried on both within and without the taxing state. *Adams Manufacturing Co.* v. *Storen*, 304 U. S. 307; *Gwin, White & Prince* v. *Henneford, supra;* cf. *Western Live Stock* v. *Bureau, supra*, 260. It is true that a state

statutes, see, Lockhart, Sales Tax in Interstate Commerce, 52 Harv. L. Rev. 617, 621. More recently it has been estimated that almost 800 municipal ordinances directed at drummers were adopted for the purpose of embarrassing this competition with local merchants. Hemphill, the House to House Canvasser in Interstate Commerce, 60 Am. L. Rev. 641. The court was cognizant of this trend, see Robbins v. Shelby County Taxing District, 120 U. S. 489, 498. Following this decision 19 such taxes were declared invalid. Carson v. Maryland, 120 U. S. 502; Asher v. Texas, 128 U. S. 129; Stoutenburgh v. Hennick, 129 U. S. 141; Brennan v. Titusville, 153 U. S. 289; Stockard v. Morgan, 185 U. S. 27; Caldwell v. North Carolina, 187 U. S. 622; Crenshaw v. Arkansas, 227 U. S. 389; Rogers v. Arkansas, 227 U. S. 401; Stewart v. Michigan, 232 U. S. 665; Davis v. Virginia, 236 U. S. 697; Real Silk Hosiery Mills v. Portland, 268 U. S. 325. Read in their proper historical setting these cases may be said to support the view that this kind of a tax is likely to be used "as an instrument of discrimination against interstate or foreign commerce", see DiSanto v. Pennsylvania, 273 U. S. 34, 39.

tax upon the operations of interstate commerce measured either by its volume or the gross receipts derived from it has been held to infringe the commerce clause, because the tax if sustained would exact tribute for the commerce carried on beyond the boundaries of the taxing state, and would leave each state through which the commerce passes free to subject it to a like burden not borne by intrastate commerce. See *Western Live Stock* v. *Bureau, supra,* 255; *Gwin, White & Prince* v. *Henneford, supra,* 439.

In *Adams Manufacturing Co.* v. *Storen, supra,* 311, 312, a tax on gross receipts, so far as laid by the state of the seller upon the receipts from sales of goods manufactured in the taxing state and sold in other states, was held invalid because there the court found the receipts derived from activities in interstate commerce, as distinguished from the receipts from activities wholly intrastate, were included in the measure of the tax, the sales price, without segregation or apportionment. It was pointed out, pages 310, 311 and 312, that had the tax been conditioned upon the exercise of the taxpayer's franchise or its privilege of manufacturing in the taxing state, it would have been sustained, despite its incidental effect on interstate commerce since the taxpayer's local activities or privileges were sufficient to support such a tax, and that it could fairly be measured by the sales price of the goods. Compare *American Manufacturing Co.* v. *St. Louis,* 250 U. S. 459 with *Crew Levick Co.* v. *Pennsylvania,* 245 U. S. 292. See *Western Live Stock* v. *Bureau, supra,* 257-259; cf. *Bass, Ratcliff & Gretton* v. *State Taxing Commission,* 266 U. S. 271, 280; *Educational Films Corp.* v. *Ward,* 282 U. S. 379, 387-8; *Pacific Co., Ltd.* v. *Johnson,* 285 U. S. 480.

The rationale of the *Adams Manufacturing Co.* case does not call for condemnation of the present tax. Here the tax is conditioned upon a local activity delivery of goods within the state upon their purchase for consumption. It is an activity which apart from its effect on the commerce, is subject to the state taxing power. The effect of the tax, even though measured by the sales price, as has been shown, neither discriminates against nor obstructs interstate commerce more than numerous other state taxes which have repeatedly been sustained as involving no prohibited regulation of interstate commerce.

In two instances already noted, respondent's contracts with Austin, Nichols & Co., and with the New England Steampship Com-

pany call for delivery of the coal at points outside of New York, in the one case f.o.b. at the mines in Pennsylvania, and in the other at the pier in Jersey City, New Jersey, and deliveries were made accordingly.

Respondent asked the state courts to rule that the taxing act did not apply to these transactions, particularly because the enabling statute expressly prohibits the city from imposing a tax upon "any transaction originating and/or consummated outside the territorial limits of the City". See *Matter of Gunther's Sons* v. *McGoldrick*, 279 N. Y. 148. This question the state courts left unanswered, the Court of Appeals resting its decision wholly on the constitutional ground.

Upon the remand of this cause for further proceedings not inconsistent with this decision, the state court will be free to decide the state question, and the remand will be without prejudice to the further presentation to this Court of any federal question remaining undecided here, if the state court shall determine that the taxing statute is applicable.

Reversed.

SUPREME COURT OF THE UNITED STATES.

No. 475.—October Term, 1939.

Joseph D. McGoldrick, Comptroller of the City of New York, Petitioner, *vs.* Berwind-White Coal Mining Company.	On Writ of Certiorari to the Supreme Court of the State of New York.

[January 29, 1940.]

Mr. Chief Justice Hughes, dissenting.

The pressure of mounting outlays has led the States to seek new sources of revenue, and we have gone far in sustaining state power to tax property and transactions subject to their jurisdiction despite incidental or indirect effects upon interstate commerce. But hitherto we have also maintained the principle that the States cannot lay a direct tax upon that commerce. In the instant case, the Court of Appeals of New York has decided unanimously that the tax as here applied is such a tax and goes beyond the limit of state power. 281 N. Y. 94. See, also, *Matter of National Cash Register Co.* v. *Taylor*, 276 N. Y. 208. I think that the judgment should be affirmed.

The case is one of interstate commerce in its most obvious form. The Berwind-White Company is a Pennsylvania corporation engaged in mining coal in that State. It has a sales' office in New York. Its coal is mined from two veins known as "B Seam" and "C Prime Seam". The coal is sold to New York consumers for plants and steamships. The contracts of sale call for coal from the seller's mines in Pennsylvania, most of it being of the "B Seam" sort. The contracts are generally for a specified period, orders being given as coal is needed. The purchasers notify the mining company of their requests, whereupon the coal is mined to meet the orders, two days being allowed for mining and five for transportation. The coal is transported from the mines by railroad to a pier in Jersey City where the seller's barges take the coal and bring it alongside the purchasers' plant or steamship where delivery is made, the pur-

chasers doing the unloading. There were two purchasers who took delivery outside New York.

The tax is two per cent of the entire purchase price. The Court of Appeals has described the tax as "two per cent upon receipts from every sale of tangible personal property sold within the City". *Matter of Sears, Roebuck & Co.* v. *McGoldrick*, 279 N. Y. 184, 197. There can be no doubt as to the incidence of the tax in this instance. The Comptroller of the City has assessed the tax against the seller, the Berwind-White Company. The statute requires the seller, under penalty, to file a return of its sales and to pay the tax. To enforce the payment, the property of the seller may be levied upon under a Comptroller's warrant. It is the tax so laid that the City now demands. In the *Matter of Atlas Television Co.*, 273 N. Y. 51, 57, 58, the Court of Appeals held that the contention that the seller was required only to collect the tax as the agent of the City could not be sustained and hence it was decided that in case of the seller's insolvency the City was entitled to priority of payment. The court said: "The duty of payment *to the city* is laid upon the vendor, not the purchaser. His liability is not measured by the amount actually collected from the purchaser but by the receipts required to be included in such return. (§ 6.) He must pay the tax even if failure to collect is due to no fault of his own". This statement was repeated in *Matter of Merchants Refrigerating Co.* v. *Taylor*, 275 N. Y. 113, 118, and while it was there said that the *Atlas* case did not hold that the sales tax was "imposed" on the vendor, still the court again ruled that the vendor "is under a duty to pay the tax to the city regardless of whether or not the vendor collects it from the purchaser". *Id.*, p. 124. If the vendor must pay the tax whether or not he can recoup the amount from the purchaser, and the tax, as here, is assessed against the vendor, it would seem inadmissible to defend the tax upon the ground that it is a tax upon the purchaser. From any point of view, the tax now contested is laid upon interstate sales.

In confiding to Congress the power to regulate interstate commerce, the aim was to provide a free national market,—to pull down and prevent the re-erection of state barriers to the free intercourse between the people of the States. That free intercourse was deemed, and has proved, to be essential to our national economy. It should not be impaired. As we recently said in *Baldwin* v. *Seelig*, 294 U. S. 511, 522: "Imposts and duties upon interstate commerce are

placed beyond the power of a state, without the mention of an exception, by the provision committing commerce of that order to the power of the Congress. . . . 'It is the established doctrine of this court that a State may not, in any form or under any guise, directly burden the prosecution of interstate business' ".

Undoubtedly the problem of maintaining the proper balance between state and national power has been a most difficult one. We have recognized the power of the State to meet local exigencies in protecting health and safety and preventing fraud, as, for example, in the case of quarantine, pilotage and inspection laws, although interstate or foreign commerce is involved; that is, until Congress in the exercise of its paramount authority displaces such local requirements.[1] We have also recognized the power of the State to tax property subject to its jurisdiction although the property has come from another State, when it is found that interstate commerce has ended and that the property has become a part of the common mass within the State. We have sustained the authority of the State to impose occupation taxes when they were deemed to be so measured or apportioned as to relate appropriately to the privilege of transacting an intrastate business. The application of these principles has led to close distinctions.[2] But that fact would seem to present no good reason for sweeping away the protection of interstate commerce where the State lays a direct tax upon that commerce as in this case.

We have said in a long line of decisions, that the States cannot tax interstate commerce either by laying the tax upon the business which constitutes such commerce or the privilege of engaging in it, or upon the receipts, as such, derived from it.[3] The same principle has been declared in recent cases. In *Fisher's Blend Station* v. *Tax Commission*, 297 U. S. 650, 655, we said: "As appellant's income

1 See cases collected in Minnesota Rate Cases, 230 U. S. 352, 403-411.

2 See Western Live Stock v. Bureau of Revenue, 303 U. S. 250, 254-257.

3 Minnesota Rate Cases, 230 U. S. 352, 400; State Freight Tax Case, 15 Wall. 232; Robbins v. Shelby Taxing District, 120 U. S. 489; Philadelphia & Southern Mail S. S. Co. v. Pennsylvania, 122 U. S. 326; Leloup v. Mobile, 127 U. S. 640; McCall v. California, 136 U. S. 104; Brennan v. Titusville, 153 U. S. 289; Galveston, Harrisburg & San Antonio Railway Co. v. Texas, 210 U. S. 217; Western Union Telegraph Co. v. Kansas, 216 U. S. 1; Pullman Co. v. Kansas, 216 U. S. 1, 56; Meyer v. Wells, Fargo & Co., 223 U. S. 298; Crenshaw v. Arkansas, 227 U. S. 389; Crew-Levick Co. v. Pennsylvania, 245 U. S. 292; Sonneborn v. Cureton, 262 U. S. 506, 515; Fisher's Blend Station v. Tax Commission, 297 U. S. 650, 655; Puget Sound Co. v. State Tax Commission, 302 U. S. 90; Adams Manufacturing Co. v. Storen, 304 U. S. 307, 311; Gwin, White & Prince v. Henneford, 305 U. S. 434, 439.

is derived from interstate commerce, the tax, measured by appellant's gross income, is of a type which has long been held to be an unconstitutional burden on interstate commerce". There, a state occupation tax upon the gross receipts of the owner of a radio station from broadcasting programs to listeners within and beyond the State was held invalid. It was said to be enough that the tax was levied on gross receipts from the proprietor's "entire operations, which include interstate commerce". *Id.*, p. 656. In *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250, a tax on the gross receipts from the sale of advertising by a trade journal was sustained because in the last analysis the tax, like that upon the privilege of manufacturing within the State, was upon the carrying on of a local business in the preparing, printing and publishing a magazine. *Id.*, p. 258. Soon after, we held in *Adams Manufacturing Company* v. *Storen*, 304 U. S. 307, 311, that a state tax could not be constitutionally applied to the gross receipts derived by an Indiana corporation in interstate commerce through the sale of its products manufactured in Indiana to customers in other States. And, but a year ago, in *Gwin, White & Prince* v. *Henneford*, 305 U. S. 435, 436, 438, we held invalid a state tax measured by the gross receipts from the business of marketing fruit shipped in interstate commerce from the State of production to places in other States where the sales and deliveries were made and the proceeds collected. If the question now before us is controlled by precedent, the result would seem to be clear.

In relation to the present transaction, it would hardly be contended that New York could tax the transportation of the coal from Pennsylvania to New York or a contract for that transportation. But the movement of the coal from the one State to the other was definitely required by the contracts of sale and these sales must be regarded as an essential part of the commercial intercourse contemplated by the commerce clause. *Gibbons* v. *Ogden*, 9 Wheat, 1, 188. The tax on the gross receipts of the seller from these sales was manifestly an imposition upon the sales themselves. Whether the tax be small or large, it is plainly to the extent of it a burden upon interstate commerce; and as it is imposed immediately upon the gross receipts from that commerce, it is a direct burden. And, as we have often said, where what is taxed is subject to the jurisdiction of the State, the size of the tax lies within the discretion of the State, and not of this Court. *A. Magnano Company* v.

Hamilton, 292 U. S. 40, 45. See, also, *Alaska Fish Company* v. *Smith*, 255 U. S. 44, 48.

How then can the laying of such a burden upon interstate commerce be justified? It is urged that there is a taxable event within the State. That event is said to be the delivery of the coal. But how can that event be deemed to be taxable by the State? The delivery is but the necessary performance of the contract of sale. Like the shipment from the mines, it is an integral part of the interstate transaction. It is said that title to the coal passes to the purchaser on delivery. But the place where the title passes has not been regarded as the test of the interstate character of a sale. We have frequently decided that where a commodity is mined or manufactured in one State and in pursuance of contracts of sale is delivered for transportation to purchasers in another State, the mere fact that the sale is f. o. b. cars in the seller's State and the purchaser pays the freight does not make the sale other than interstate.[4] And when, as here, the buyer in an interstate sale takes delivery in his own State, that delivery in completion of the sale is as properly immune from state taxation as is the transportation to the purchaser's dock or vessel. Moreover, even if it were possible to sustain a state tax by reason of such delivery within the State, there would still be no ground for sustaining a tax upon the whole of the interstate transaction of which the delivery is only a part, as in the case of a tax upon the entire gross receipts.

Petitioner strongly insists that in substance the tax here should be regarded as the same as a *use* tax the validity of which this Court has sustained. *Henneford* v. *Silas Mason Co.*, 300 U. S. 577; *Southern Pacific Company* v. *Gallagher*, 306 U. S. 167. But in the *Henneford* case, Mr. Justice Cardozo, in speaking for the Court, was most careful to show that the use tax was upheld because it was imposed after interstate commerce had come to an end. In making this distinction, the Court clearly recognized that a tax imposed directly upon interstate commerce would be beyond the State's power, and the tax was sustained as one upon property which had come to rest within the State and like other property was subject to its jurisdiction. The Court said: "The tax is not upon the operations of interstate commerce, but

[4] Savage v. Jones, 225 U. S. 501, 520; Pennsylvania R. R. Co. v. Clark Coal Co., 238 U. S. 456, 465, 468; Carter v. Carter Coal Co., 298 U. S. 238, 320; Santa Cruz Fruit Packing Co. v. National Labor Relations Board, 303 U. S. 453, 463.

upon the privilege of use after commerce is at an end. . . . The privilege of use is only one attribute, among many, of the bundle of privileges that make up property or ownership". *Id.*, p. 582. And later, in *Puget Sound Company* v. *State Tax Commission*, 302 U. S. 90, 92, 94, Mr. Justice Cardozo in delivering the opinion of the Court, after showing that the business of the company, so far as it consisted of the loading and discharge of cargoes by longshoremen subject to its own control, was interstate or foreign commerce, concluded that the State was "not at liberty to tax the privilege of doing it by exacting in return therefor a percentage of the gross receipts". He observed that "Decisions to that effect are many and controlling". The fact that a use tax, sustained as a tax upon an attribute of property which is subject to the jurisdiction of the State, may have an incidental or indirect effect upon interstate commerce, and thus in the opinion of commentators may tend to discourage interstate transactions, is certainly no excuse for going further and upholding the action of States which, looking with a jealous eye upon the freedom of interstate commerce, attempt to lay a direct tax upon that commerce.

The point was clearly brought out by Mr. Justice Holmes, speaking for the Court in *Galveston, Harrisburg & San Antonio Railway Co.* v. *Texas*, 210 U. S. 217, 227, when he referred to the necessity of maintaining the distinction between taxation of property within the State, which had long been upheld, and taxation of interstate business which had been condemned. He observed that "When a legislature is trying simply to value property, it is less likely to attempt to or effect injurious regulation than when it is aiming directly at the receipts from interstate commerce". Accordingly a state tax upon gross receipts which included receipts from interstate business was held invalid.

The ground most strongly asserted for sustaining the tax in the present case is that it is non-discriminatory. Undoubtedly a state tax may be bad because it is so laid as to involve a hostile discrimination against interstate commerce. But does it follow that a State may lay a direct tax upon interstate commerce because it is free to tax its own commerce in a similar way? Thus, a State may tax intrastate transportation, but it may not tax interstate transportation. The State may tax intrastate sales,[5] but can the State tax interstate

[5] Woodruff v. Parham, 8 Wall. 123; Sonneborn Bros. v. Cureton, 262 U. S. 506, 515, 516; Wiloil Corporation v. Pennsylvania, 294 U. S. 169, 175.

sales in order to promote its local business? It would seem to be extraordinary if a State could escape the restriction against direct impositions upon interstate commerce by first laying exactions upon its own trade and then insisting that in order to make its local policy completely effective it must be allowed to lay similar exactions upon interstate trade. That would apparently afford a simple method for extending state power into what has hitherto been regarded as a forbidden field. Moreover, it may or may not be in the interest of the State to promote domestic trade in a given commodity. The State may seek by its taxing scheme to restrict such trade and the mere equivalency of a tax upon domestic business would not prevent the injurious effect upon interstate transactions. See *A. Magnano Company* v. *Hamilton, supra.*

So, while recognizing that a tax discriminating against interstate commerce is necessarily invalid, it has long been held by this Court in the interest of the constitutional freedom of that commerce that a direct tax upon it is not saved because the same or a similar tax is laid also upon intrastate commerce. The Court dealt specifically with that question in *Robbins* v. *Shelby County Taxing District*, 120 U. S. 489, 497, saying: "Interstate commerce cannot be taxed at all, even though the same amount of tax should be laid on domestic commerce, or that which is carried on solely within the State". See, also, *Cooney* v. *Mountain States Telephone Co.*, 294 U. S. 384, 393, 394. And very recently, in *Adams Manufacturing Company* v. *Storen, supra*, p. 312, where a tax on the gross receipts derived from interstate sales was held invalid, we said explicitly: "The opinion of the State Supreme Court stresses the generality and non discriminatory character of the exaction, but it is settled that this will not save the tax if it directly burdens interstate commerce".

We have directed attention to a vice in imposing direct taxes upon interstate commerce in that such taxes might be imposed with equal right by every State which the commerce touches. This has been observed with respect to taxes upon gross receipts from interstate transactions. In *Western Live Stock* v. *Bureau of Revenue, supra*, p. 256, we said: "The multiplication of state taxes measured by the gross receipts from interstate transactions would spell the destruction of interstate commerce and renew the barriers to interstate trade which it was the object of the commerce

clause to remove". See, also, *Gwin, White & Prince* v. *Henneford, supra.* But petitioner has insisted that in the present case there is no danger of multiple taxation in that New York puts its tax upon an event which cannot occur in any other State. Of course the delivery of the coal in New York is an event which cannot occur in another State. Just as New York cannot tax the shipment of coal from the mines in Pennsylvania or the transshipment of the coal in New Jersey, so neither Pennsylvania nor New Jersey can tax the delivery in New York. Petitioner's argument misses the point as to the danger of multiple taxation in relation to interstate commerce. The shipment, the transshipment and the delivery of the coal are but parts of a unitary interstate transaction. They are integral parts of an interstate sale. If, because of the delivery in New York, that State can tax the gross receipts from the sale, why cannot Pennsylvania by reason of the shipment of the coal in that State tax the gross receipts there? That would not be difficult, as the seller is a Pennsylvania corporation and in fact in many, if not in most, instances, the purchase price of the goods shipped to New York is there received. The point is not that the delivery in New York is an event which cannot be taxed by other States, but that the authority of New York to impose a tax on that delivery cannot properly be recognized without also recognizing the authority of other States to tax the parts of the interstate transaction which take place within their borders. If New York can tax the delivery, Pennsylvania can tax the shipment and New Jersey the transshipment. And the latter States, respectively, would be as much entitled to tax the gross receipts from the sales as would New York. Even if it were assumed that the gross receipts from the interstate sales could be apportioned so that each State could tax such portion of the receipts as could be deemed to relate to the part of the transaction within its territory, still this would not help New York here, as there has been no attempt at apportionment. The taxation of the gross receipts in New York, on any appropriate view of what pertains to the interstate sales, would seem clearly to involve the danger of multiple taxation to which we have adverted in recent decisions.

Doubtless much can be said as to the desirability of a comprehensive system of taxation through the cooperation of the Union and the States so as to avoid the differentiations which beset the application of the commerce clause and thus to protect both state and

national governments by a just and general scheme for raising revenues. However important such a policy may be, it is not a matter for this Court. We have the duty of maintaining the immunity of interstate commerce as contemplated by the Constitution. That immunity still remains an essential buttress of the Union, and a free national market, so far as it can be preserved without violence to state power over the subjects within state jurisdiction, is not less now than heretofore a vital concern of the national economy.

The tax as here applied is open to the same objection as a tariff upon the entrance of the coal into the State of New York, or a state tax upon the privilege of doing an interstate business, and in my view it cannot be sustained without abandoning principles long established and a host of precedents soundly based.

Mr. Justice McREYNOLDS and Mr. Justice ROBERTS join in this opinion.